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Massachusetts. Supreme Judicial Court

**MASSACHUSETTS REPORTS**

**193**

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**CASES ARGUED AND DETERMINED**

**IN THE**

**SUPREME JUDICIAL COURT**

**OF**

**MASSACHUSETTS**

**OCTOBER 1906 — JANUARY 1907**

**HENRY WALTON SWIFT**

**REPORTER**

**BOSTON**

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**JUSTICES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.**

**HON. JAMES MADISON MORTON.**

**HON. JOHN WILKES HAMMOND.**

**HON. WILLIAM CALEB LORING.**

**HON. HENRY KING BRALEY.**

**HON. HENRY NEWTON SHELDON.**

**HON. ARTHUR PRENTICE RUGG.**

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**ATTORNEY GENERAL.**

**HON. DANA MALONE.**



# TABLE

## OF THE CASES REPORTED.

Adams v. Stoneham . . . . .	597	Blackwell v. Old Colony Street	
Allen v. Boardman . . . . .	284	Railway . . . . .	222
American Steel & Wire Co.		Blair v. Columbian Fireproof-	
(Erickson v.) . . . . .	119	ing Co. . . . .	540
— (Hannan v.) . . . . .	127	Blue Hill Street Railway (Du-	
— (Johnson v.) . . . . .	119	gan v.) . . . . .	431
— (Matthews v.) . . . . .	119	Boardman (Allen v.) . . . . .	284
American Unitarian Associa-		Bogigian v. Booklovers Library	444
tion v. Commonwealth . . . . .	470	— (Booklovers Library	
American Wood Working Ma-		v.) . . . . .	444
chinery Co. v. Furbush . . . . .	455	Booklovers Library v. Bogigian	444
Amherst, Assessors of (Am-		— (Bogigian v.) . . . . .	444
herst College v.) . . . . .	168	Boston (Averill v.) . . . . .	488
Amherst College v. Assessors		— (Chase v.) . . . . .	522
of Amherst . . . . .	168	— (Corcoran v.) . . . . .	586
Andrews v. Williamson . . . . .	92	— (Prince v.) . . . . .	545
Anglim (Wheeler v.) . . . . .	600	— (Tappan v.) . . . . .	488
Anternoitz v. New York, New		Boston & Maine Railroad	
Haven, & Hartford Railroad	542	(Creden v.) . . . . .	280
Anthony (Norris v.) . . . . .	225	— (Foley v.) . . . . .	382
Arlington (Partridge v.) . . . . .	530	Boston & Northern Street Rail-	
Artesian Water Co. (Coffin		way (Hamilton v.) . . . . .	324
v.) . . . . .	274	— (Kuhlen v.) . . . . .	341
Ashley (Morse v.) . . . . .	294	— (Pomeroy v.) . . . . .	507
Atkins (Foss v.) . . . . .	486	— (Shanahan v.) . . . . .	412
Attleboro Manuf. Co. (Hodde		— (Stubbs v.) . . . . .	513
v.) . . . . .	237	Boston Elevated Railway	
Attorney General (Sears v.) . . . . .	551	(Hourigan v.) . . . . .	495
Averill v. Boston . . . . .	488	— (Jameson v.) . . . . .	560
		— (Stackpole v.) . . . . .	562
Baggeski v. Lyman Mills . . . . .	103	— (Thomas v.) . . . . .	438
Bailey v. Marden . . . . .	277	Boston, Mayor of (Hill v.) . . . . .	569
Ball (Holland v.) . . . . .	80	— (Ransom v.) . . . . .	537
Barnes (Squier v.) . . . . .	21	Boston Molasses Co. v. Com-	
Benoit (Pettay v.) . . . . .	233	monwealth . . . . .	387
Biggert v. Straub . . . . .	77	Boston, Police Commissioner	
Bird (Lindsey v.) . . . . .	200	for (Sims v.) . . . . .	547
Black v. New York, New Ha-		Bowditch v. Norwich Union	
ven, & Hartford Railroad . . . . .	448	Ins. Co. . . . .	565

Bradlee v. Southern Coast Lumber Co. . . . .	378	Creeden v. Mahoney . . . . .	402
Brazier (Demelman v.) . . . . .	588	Cromwell v. Norton . . . . .	291
Bridgham v. Vaughan . . . . .	392	Cutting v. Shelburne . . . . .	1
—— (Vaughan v.) . . . . .	392	Daniels v. Clarke . . . . .	84
Bromley v. New York, New Haven, & Hartford Railroad . . . . .	453	Demelman v. Brazier . . . . .	588
Brooks v. West Springfield . . . . .	190	Devine (Richardson v.) . . . . .	336
Brown v. Clothey . . . . .	271	Dexter (First Baptist Society in Brookfield v.) . . . . .	187
Burns v. Worcester Consolidated Street Railway . . . . .	63	Dugan v. Blue Hill Street Railway . . . . .	431
Burrell (Cannon v.) . . . . .	534	Durfee v. Meadowcroft . . . . .	267
Butler (Gardner v.) . . . . .	96	Eastern Bridge & Structural Co. (Ford v.) . . . . .	89
Cahill v. New England Telephone & Telegraph Co. . . . .	415	Elmer (Gallus v.) . . . . .	106
Campbell v. Cook . . . . .	251	Erickson v. American Steel & Wire Co. . . . .	119
Cannon v. Burrell . . . . .	534	Farrigan v. Pevear . . . . .	147
Carey v. Milford & Uxbridge Street Railway . . . . .	161	Favor (Jacobson v.) . . . . .	85
Cave v. Osborne . . . . .	482	First Baptist Society in Brookfield v. Dexter . . . . .	187
Chapin (Kemensky v.) . . . . .	500	First Congregational Society in East Longmeadow v. Metcalf . . . . .	288
Charlie Joe (Commonwealth v.) . . . . .	383	Fitchburg & Leominster Street Railway (Harris v.) . . . . .	56
Chase v. Boston . . . . .	522	—— (Ormandroyd v.) . . . . .	130
City Bank of New Haven v. Wilson . . . . .	164	Foley v. Boston & Maine Railroad . . . . .	332
Clarke (Daniels v.) . . . . .	84	Forbes v. Keyes . . . . .	38
Clinton Gas Light Co. (McCarty v.) . . . . .	76	Ford v. Eastern Bridge & Structural Co. . . . .	89
Clothey (Brown v.) . . . . .	271	Foss v. Atkins . . . . .	486
Coffey v. Coffey . . . . .	398	Fugazzi (Sullivan v.) . . . . .	518
Coffin v. Artesian Water Co. . . . .	274	Fuller (Hodgdon v.) . . . . .	331
Columbian Fireproofing Co. (Blair v.) . . . . .	540	Furbush (American Wood Working Machinery Co. v.) . . . . .	455
Commonwealth (American Unitarian Association v.) . . . . .	470	Gallus v. Elmer . . . . .	106
—— (Boston Molasses Co. v.) . . . . .	387	Gardner v. Butler . . . . .	96
—— v. Charlie Joe . . . . .	383	Gardner, Westminster & Fitchburg Street Railway (Thompson v.) . . . . .	133
—— v. Hartford . . . . .	464	Germania Ins. Co. v. Lange . . . . .	67
Cook (Campbell v.) . . . . .	251	Gilmore v. Milford & Uxbridge Street Railway . . . . .	44
Corbett v. Craven . . . . .	30	Gourse (Warburton v.) . . . . .	203
Corcoran v. Boston . . . . .	586	Green v. Haverhill & Amesbury Street Railway . . . . .	428
County Commissioners, petitioners . . . . .	257	Greer v. Union Street Railway . . . . .	246
Crafts (Toole v.) . . . . .	110		
Crave & Martin Co. (Sullivan v.) . . . . .	435		
Craven (Corbett v.) . . . . .	30		
Creeden v. Boston & Maine Railroad . . . . .	280		

Hamilton v. Boston & Northern Street Railway . . .	324	Kuhlen v. Boston & Northern Street Railway . . .	341
Hannan v. American Steel & Wire Co. . . . .	127	Ladd v. New York, New Haven, & Hartford Railroad .	359
Harris v. Fitchburg & Leominster Street Railway . . .	56	Langdeau v. Prudential Ins. Co. . . . .	215
— (Putnam v.) . . . .	58	Lange (Germania Ins. Co. v.) .	67
Hartford (Commonwealth v.) .	464	Lee v. Methodist Episcopal Church . . . . .	47
Harvey-Watts Co. v. Worcester Umbrella Co. . . . .	138	Lehan (McGuinness v.) . . .	241
Haverhill (Hodgdon v.) . . .	327	Leland (Nathan v.) . . . .	576
— (Hodgdon v.) . . . .	406	Leonard v. Weymouth . . .	479
Haverhill & Amesbury Street Railway (Green v.) . . .	428	Levi v. Worcester Consolidated Street Railway . . . . .	116
Haverhill & Plaistow Street Railway (O'Leary v.) . . .	339	Lindsey v. Bird . . . . .	200
Hawkes v. Kehoe . . . . .	419	Lowell (Neas v.) . . . . .	441
Hill v. Mayor of Boston . . .	569	Lyman Mills (Baggeski v.) .	103
Hodde v. Attleboro Manuf. Co. .	287	McCarty v. Clinton Gas Light Co. . . . .	76
Hodgdon v. Fuller . . . . .	331	McCauliff (Pickwick v.) . . .	70
— v. Haverhill . . . . .	327	McGuinness v. Lehan . . . .	241
— v. — . . . . .	406	McLellan (Kennedy v.) . . .	528
Holland v. Ball . . . . .	80	McLeod v. South Deerfield Water Supply District . . .	6
Holyoke (Moynihan v.) . . . .	26	McQuillin (Smith v.) . . . .	289
Horr v. New York, New Haven, & Hartford Railroad .	100	Mahoney (Creeden v.) . . . .	402
Hourigan v. Boston Elevated Railway . . . . .	495	Marden (Bailey v.) . . . . .	277
Interstate Consolidated Street Railway (James v.) . . .	264	Mason v. Whitney . . . . .	152
Jacobson v. Favor . . . . .	85	Mathews v. American Steel & Wire Co. . . . .	119
James v. Interstate Consolidated Street Railway . . .	264	Mayor of Boston (Hill v.) . .	569
— (Rice v.) . . . . .	458	— (Ransom v.) . . . . .	537
Jameson v. Boston Elevated Railway . . . . .	560	Meadowcroft (Durfee v.) . . .	267
Johnson v. American Steel & Wire Co. . . . .	119	— v. New York, New Haven, & Hartford Railroad .	249
Kehoe (Hawkes v.) . . . . .	419	Merriam (Ward v.) . . . . .	185
Kemensky v. Chapin . . . . .	500	Metcalf (First Congregational Society in East Longmeadow v.) . . . . .	288
Kennedy v. McLellan . . . . .	528	Methodist Episcopal Church (Lee v.) . . . . .	47
Keyes (Forbes v.) . . . . .	38	Milford & Uxbridge Street Railway (Carey v.) . . .	161
Kimball (Smith v.) . . . . .	582	— (Gilmore v.) . . . . .	44
— (United Shoe Machinery Co. v.) . . . . .	351	— (Moran v.) . . . . .	52
Kingsley v. South Deerfield Water Supply District . . .	6	Mills v. Smith . . . . .	11
Knibbs (Multer v.) . . . . .	556	Moore (Warburton v.) . . . .	267
Koffman v. Koffman . . . . .	593	Moran v. Milford & Uxbridge Street Railway . . . . .	52
		Morse v. Ashley . . . . .	294



Moynihah v. Holyoke . . . . .	26	Sears v. Attorney General . . . . .	551
Multer v. Knibbs . . . . .	556	Shanahan v. Boston & North- ern Street Railway . . . . .	412
Nathan v. Leland . . . . .	576	Shattuck v. South Deerfield Water Supply District . . . . .	6
Neas v. Lowell . . . . .	441	Shelburne (Cutting v.) . . . . .	1
New England Telephone & Telegraph Co. (Cahill v.) . . . . .	415	Sherman v. Sherman . . . . .	400
New York, New Haven, & Hartford Railroad (Anter- noitz v.) . . . . .	542	Shultz v. Old Colony Street Railway . . . . .	309
—— (Black v.) . . . . .	448	Sims v. Police Commissioner for Boston . . . . .	547
—— (Bromley v.) . . . . .	453	Smith v. Kimball . . . . .	582
—— (Horr v.) . . . . .	100	—— v. McQuillin . . . . .	289
—— (Ladd v.) . . . . .	359	—— (Mills v.) . . . . .	11
—— (Meadowcroft v.) . . . . .	249	South Deerfield Water Supply District (Kingsley v.) . . . . .	6
Norris v. Anthony . . . . .	225	—— (McLeod v.) . . . . .	6
Norton (Cromwell v.) . . . . .	291	—— (Shattuck v.) . . . . .	6
Norwich Union Ins. Co. (Bow- ditch v.) . . . . .	565	Southern Coast Lumber Co. (Bradlee v.) . . . . .	378
Nye v. Whittemore . . . . .	208	Squier v. Barnes . . . . .	21
Old Colony Street Railway (Blackwell v.) . . . . .	222	Stackpole v. Boston Elevated Railway . . . . .	562
—— (Shultz v.) . . . . .	309	Stone (Peters v.) . . . . .	179
—— (Williams v.) . . . . .	305	Stoneham (Adams v.) . . . . .	597
O'Leary v. Haverhill & Plaistow Street Railway . . . . .	339	Straub, (Biggart v.) . . . . .	77
Opinion of the Justices . . . . .	605	Street Commissioners (Tappan v.) . . . . .	498
Ormandroyd v. Fitchburg & Leominster Street Railway . . . . .	130	Stubbs v. Boston & Northern Street Railway . . . . .	513
Osborne (Cave v.) . . . . .	482	Sullivan v. Crave & Martin Co. . . . .	435
Paquette v. Prudential Ins. Co. . . . .	215	—— v. Fugazzi . . . . .	518
Partridge v. Arlington . . . . .	530	Swasey (Welch v.) . . . . .	364
Peters v. Stone . . . . .	179	Tappan v. Boston . . . . .	488
Petty v. Benoit . . . . .	233	—— v. Street Commis- sioners . . . . .	498
Pevear (Farrigan v.) . . . . .	147	Taylor (Wills v.) . . . . .	113
Phelps (Temple v.) . . . . .	297	Temple & Phelps . . . . .	297
Pickwick v. McCauliff . . . . .	70	Thomas v. Boston Elevated Railway . . . . .	438
Police Commissioner for Bos- ton (Sims v.) . . . . .	547	Thompson v. Gardner, West- minster & Fitchburg Street Railway . . . . .	133
Pomeroy v. Boston & Northern Street Railway . . . . .	507	Tisbury v. Vineyard Haven Water Co. . . . .	196
Prince v. Boston . . . . .	545	Toole v. Crafts . . . . .	110
Prudential Ins. Co. (Langdeau v.) . . . . .	215	Union Street Railway (Greer v.) . . . . .	246
—— (Paquette v.) . . . . .	215	United Shoe Machinery Co. v. Kimball . . . . .	351
Putnam v. Harris . . . . .	58		
Ransom v. Mayor of Boston . . . . .	537		
Rice v. James . . . . .	458		
Richardson v. Devine . . . . .	336		

Vaughan v. Bridgham . . . . .	392	Whittemore (Nye v.) . . . . .	208
—— (Bridgham v.) . . . . .	392	Williams v. Old Colony Street	
Vineyard Haven Water Co.		Railway . . . . .	305
(Tisbury v.) . . . . .	196	Williamson (Andrews v.) . . . .	92
		Wills v. Taylor . . . . .	113
Warburton v. Gourse . . . . .	203	Wilson (City Bank of New	
—— v. Moore . . . . .	267	Haven v.) . . . . .	164
Ward v. Merriam . . . . .	135	Worcester Consolidated Street	
Welch v. Swasey . . . . .	364	Railway (Burns v.) . . . . .	63
West Springfield (Brooks v.) . .	190	—— (Levi v.) . . . . .	116
Weymouth (Leonard v.) . . . .	479	Worcester Umbrella Co. (Har-	
Wheeler v. Anglim . . . . .	600	vey-Watts Co. v.) . . . . .	138
Whitney (Mason v.) . . . . .	152		



# TABLE OF CASES

CITED BY THE COURT.

Abbott v. Foote, 146 Mass. 333	400	Atlantic & Danville Railroad v.	
— v. Frost, 185 Mass. 398	193	Ironmonger, 95 Va. 625	819
Abington v. Duxbury, 105 Mass. 287	597	Attorney General v. Boston, 123	
Adams, petitioner, 165 Mass. 497	411	Mass. 460	377, 540
— v. Pierce, 177 Mass. 206	206	— v. Cock, 2 Ves. Sr. 273	554
Adasken v. Gilbert, 165 Mass. 443	89	— v. Donahue, 169 Mass. 18	549
Agawam v. Hampden, 180 Mass. 528	410	— v. Electric Storage Battery	
Aiken v. Holyoke Street Railway,		Co. 188 Mass. 239	617
180 Mass. 8	65	— v. Federal Street Meeting-	
— v. —, 184 Mass. 269	452	house, 3 Gray, 1	555
Alabama & Vicksburg Railway v.		— v. Goulding, 2 Bro. C. C. 428	553
Davis, 69 Miss. 444	319	— v. Lawes, 8 Hare, 32	554
Albert v. Boston Elevated Railway,		— v. Northampton, 143 Mass.	
185 Mass. 210	544	589	377
Albrecht v. Cudihee, 37 Wash. 206	110	— v. Old South Society, 13 Al-	
Alden v. Goddard, 73 Maine. 345	304	len, 474	558
Aldrich v. Husband, 181 Mass. 480	187	— v. Union Society, 116 Mass.	
Alexander v. McPeck, 189 Mass. 34	80	167	555
Allen v. Fuller, 118 Mass. 402	236	— v. Williams, 174 Mass. 476	373,
— v. Riley, 203 U. S. 347	611		410
Allwright v. Skillings, 188 Mass. 538	236	Atwood v. Bangor, Orono & Old	
Allyn v. Allyn, 154 Mass. 570	425	Town Railway, 91 Maine, 899	452
— v. Boston & Albany Rail-		Aultman v. Ritter, 81 Wis. 395	304
road, 105 Mass. 77	812	Ayers v. Hatch, 175 Mass. 489	550, 573
Almy v. Crapo, 100 Mass. 218	41	Aynsley v. Glover, L. R. 18 Eq. 544	119
Alworth v. Seymour, 42 Minn. 526	16		
American Bank v. Rollins, 99 Mass.		Bachant v. Boston & Maine Rail-	
313	79	road, 187 Mass. 392	366
Ames v. Armstrong, 106 Mass. 15	48	Bacon v. Eccles, 48 Wis. 227,	506
Amherst College v. Amherst, 173		Badger v. McNamara, 123 Mass. 117	251
Mass. 232	178	Bailey v. Jourdan, 18 App. Div.	
Amicable Ins. Co. v. Sedgwick, 110		(N. Y.) 887	818
Mass. 163	89	Balcom v. Haynes, 14 Allen, 204	287
Anchor Electric Co. v. Hawkes, 171		Ball v. Holland, 189 Mass. 389	83
Mass. 101	358	Baltimore & Ohio Railroad v. State,	
Anon. 2 Vent. 349	554	83 Md. 542	452
Arhuckle v. Blackburn, 113 Fed.		— v. —, 79 Md. 335	318
Rep. 616	613	Bancroft v. Union Embossing Co.	
Arnold v. Eastman Freight Car		72 N. H. 402	358
Heater Co. 176 Mass. 135	89	Banks v. Braman, 188 Mass. 367	55, 452
— v. Harrington Cutlery Co.		Barker v. Loring, 177 Mass. 389	486
189 Mass. 547	123	Barnes v. Barnes, 161 Mass. 881	406
Arvilla v. Spaulding, 121 Mass. 505	436	— v. Rumford, 96 Maine, 315	317
Aspdin v. Austin, 5 Q. B. 671	382	Barrett v. Parsons, 10 Cush. 867	158
Aspinwall v. Boston, 191 Mass. 441	493	Barron v. Boston, 187 Mass. 168	546
Atherton v. Newhall, 123 Mass. 141	506	Bartlett, petitioner, 163 Mass. 509	555

Bartlett v. Nye, 4 Met. 378	148	Bristow v. Bristow, 5 Beav. 289	553
— v. Slater, 183 Mass. 152	487	Britton v. Cummington, 107 Mass. 347	5
— v. Worcester Consolidated Street Railway, 189 Mass. 360	565	Broadway National Bank v. Baker, 176 Mass. 294	574
Bassett v. Granger, 100 Mass. 348	287	Broadbent v. Revere, 182 Mass. 598	375
Baxter v. Penniman, 8 Mass. 183	330	Brooks v. Jackson, 125 Mass. 307	41
Beal v. Nichols, 2 Gray, 262	521	— v. Old Colony Railroad, 168 Mass. 164	346
Beehler v. Daniels, 18 R. L. 563	283	Brown v. Brown, 174 Mass. 197	142
Belt v. Lawes, 12 Q. B. D. 356	414	— v. —, 124 N. C. 19	558
Bement v. National Harrow Co. 186 U. S. 70	611	— v. Corey, 191 Mass. 189	256
Bemis v. Boston, 14 Allen, 366	194	— v. Cushman, 173 Mass. 368	17
— v. Temple, 162 Mass. 342	102	— v. Woodbury, 183 Mass. 279	485
Bennett v. Smith, 21 Barb. 439	558	Brusseau v. New York, New Haven, & Hartford Railroad, 187 Mass. 84	55
Bent v. Stone, 184 Mass. 92	206	Bryant v. Palmer, 152 N. Y. 412	411
Benton v. Boston City Hospital, 140 Mass. 18	149	— v. Rich, 106 Mass. 180	346
Berlin v. Bolton, 10 Met. 115	207	Bullard v. Saratoga Victory Manuf. Co. 77 N. Y. 525	158
Bernina, The, 12 P. D. 58	314	Bunting v. Hogsett, 189 Penn. St. 363	315
Berry v. Boston Elevated Railway, 188 Mass. 536	284	Burbank v. Burbank, 152 Mass. 254	553
Bigelow v. Norris, 139 Mass. 12	582	Burghardt v. Van Deusen, 4 Allen, 374	220, 437
— v. West End Street Railway, 161 Mass. 393	135	Burke v. Burke, 170 Mass. 499	301
Birmingham Railway & Electric Co. v. Baker, 132 Ala. 507	316	Burt v. Wigglesworth, 117 Mass. 802	520
Bjornquist v. Boston & Albany Railroad, 185 Mass. 180	452, 544	Burton v. Great Northern Railway, 9 Exch. 507	382
Blackstone v. Miller, 188 U. S. 189	79	Burwell v. Cawood, 2 How. 560	18
Blair v. Columbian Fireproofing Co. 191 Mass. 383	541	Busell Trimmer Co. v. Coburn, 188 Mass. 254	382
Blake v. Mahan, 2 Allen, 75	205, 302	Butler v. Hildreth, 5 Met. 49	539
— v. Traders' National Bank, 145 Mass. 13	574	Butrick, petitioner, 185 Mass. 107	36
Bliss v. Kershaw, 180 Mass. 99	206	Butterfield v. Byron, 153 Mass. 517	423
Blood v. Tyngsborough, 103 Mass. 509	5	Buttrick v. Holden, 8 Cush. 233	427
Bly v. Haverhill, 110 Mass. 520	5	Buxton v. Ainsworth, 138 Mich. 532	452
Borrowdale v. Bosworth, 98 Mass. 34	418	Byrnes v. Boston & Maine Railroad, 181 Mass. 322	284
— v. Tuttle, 5 Allen, 377	35	Byron v. Lynn & Boston Railroad, 177 Mass. 803	335
Bose v. Christ, 193 Penn. St. 13	51	Cadigan v. Crabtree, 179 Mass. 474	585
Boston v. Mayor of Boston, 193 Mass. 537	573	— v. —, 186 Mass. 7	585
Boston Hat Manufactory v. Messenger, 2 Pick. 223	69	Cahill v. Cincinnati Railway, 92 Ky. 845	317
Boston Loan Co. v. Boston, 137 Mass. 332	545	Cahn v. Manhattan Railway, 76 N. Y. Supp. 893	440
Boston Molasses Co. v. Commonwealth, 193 Mass. 387	587	Caldwell v. Moore, 11 Penn. St. 58	391
Bostwick v. Minneapolis & Pacific Railway, 2 No. Dak. 440	452	— v. Slade, 156 Mass. 84	444
Botkin v. Miller, 190 Mass. 411	562	Caledonian Railway v. Mulholland, [1898] A. C. 216	362
Bowers v. Connecticut River Railroad, 162 Mass. 312	362	California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306	373
— v. Hammond, 139 Mass. 300	262	Callender v. Flint, 187 Mass. 104	592
Bowles v. Bingham, 2 Munford, 442	597	— v. Marsh, 1 Pick. 418	583
Brackenridge v. Fitchburg, 145 Mass. 160	5	Calloway v. Cossart, 45 Ark. 81	390
Brady v. Finn, 162 Mass. 260	62	Cambridge v. County Commissioners, 117 Mass. 79	533
Brandt v. Klein, 17 Johns. 335	304	Campbell v. Boston, 189 Mass. 7	4, 512
Breck v. Barney, 188 Mass. 133	148	— v. New England Ins. Co. 98 Mass. 381	222
Bresce v. Los Angeles Traction Co. 85 Pac. Rep. 162	318	Canton v. Bentley, 11 Mass. 441	596
Brickell v. New York Central & Hudson River Railroad, 120 N. Y. 290	318	Carleton v. Franconia Iron & Steel Co. 99 Mass. 216	350
Brigham v. Elwell, 145 Mass. 520	43		

<i>Carlisle v. Brisbane</i> , 118 Penn. St. 544	315	<i>Coates v. Burton</i> , 191 Mass. 180	287
— <i>v. Sheldon</i> , 88 Vt. 440	315	<i>Cobb v. Massachusetts Chemical Co.</i> 179 Mass. 423	119
<i>Carpenter v. County Commissioners</i> , 21 Pick. 258	73	<i>Coffin v. Landis</i> , 46 Penn. St. 426	382
— <i>v. Holcomb</i> , 105 Mass. 280	427	<i>Cohen v. Nagle</i> , 190 Mass. 4	201, 397
— <i>v. Pocasset Manuf. Co.</i> 180 Mass. 180	186	<i>Colbert v. Moore</i> , 185 Mass. 227	143, 201
<i>Carr v. Easton</i> , 142 Penn. St. 139	315	<i>Coleman v. Lowell, Lawrence &amp; Haverhill Street Railway</i> , 181 Mass. 591	54
— <i>v. State</i> , 127 Ind. 204	390	<i>Collinson v. Pater</i> , 2 Russ. & Myl. 344	553
<i>Carrigan v. Massachusetts Benefit Assoc.</i> 26 Fed. Rep. 230	221	<i>Colorado &amp; Southern Railway v. Thomas</i> , 33 Col. 517	816
<i>Carroll v. New York, New Haven, &amp; Hartford Railroad</i> , 182 Mass. 237	250	<i>Columbia Wire Co. v. Freeman Wire Co.</i> 71 Fed. Rep. 302	618
<i>Carter v. Boston Towboat Co.</i> 185 Mass. 496	417	<i>Combe v. London &amp; Southwestern Railway</i> , 31 L. T. (N. S.) 613	362
<i>Cassady v. Old Colony Street Railway</i> , 184 Mass. 156	46	<i>Combe v. Fisher</i> , 3 Bibb, 51	426
<i>Central Bridge v. Lowell</i> , 15 Gray, 106	206	<i>Commonwealth v. Andre</i> , 3 Pick. 224	983
<i>Central Texas &amp; Northwestern Railway v. Gibson</i> , 35 Tex. App. 66	319	— <i>v. Bacon</i> , 185 Mass. 521	305
<i>Chace v. Sherman</i> , 119 Mass. 887	138	— <i>v. Bennett</i> , 108 Mass. 27	874
<i>Chalmers v. Whitmore Manuf. Co.</i> 164 Mass. 532	126	— <i>v. Bingham</i> , 158 Mass. 169	520
<i>Chamberlain v. Dunlop</i> , 126 N. Y. 45	18	— <i>v. Blankinship</i> , 165 Mass. 40	387
— <i>v. People</i> , 23 N. Y. 85	597	— <i>v. Bond</i> , 188 Mass. 91	469
<i>Champion v. Buckingham</i> , 165 Mass. 76	582	— <i>v. Boston Advertising Co.</i> 189 Mass. 343	374
<i>Chapin v. Holyoke Young Men's Christian Association</i> , 165 Mass. 280	149	— <i>v. Boynton</i> , 12 Cush. 499	468
<i>Chapman v. State</i> , 104 Cal. 690	390	— <i>v. Bradford</i> , 9 Met. 268	144
<i>Charlestown v. County Commissioners</i> , 101 Mass. 87	176	— <i>v. Coburn</i> , 182 Mass. 555	346
<i>Chase v. Boston</i> , 180 Mass. 458	524	— <i>v. Coleman</i> , 157 Mass. 460	469
— <i>v. Hubbard</i> , 153 Mass. 91	143	— <i>v. —</i> , 184 Mass. 198	387
— <i>v. Webster</i> , 168 Mass. 228	596	— <i>v. Connelly</i> , 163 Mass. 539	144
<i>Chesebro v. Barme</i> , 163 Mass. 79	206	— <i>v. Dana</i> , 2 Met. 329	469
<i>Chicago &amp; Great Eastern Railway v. Dane</i> , 43 N. Y. 240	382	— <i>v. Desmond</i> , 103 Mass. 445	207
<i>Chicago, Burlington &amp; Quincy Railway v. Drainage Commissioners</i> , 200 U. S. 561	376	— <i>v. Devaney</i> , 182 Mass. 33	469
<i>Chicago, Rock Island &amp; Pacific Railway v. Sturm</i> , 174 U. S. 710	79	— <i>v. Hersey</i> , 2 Allen, 173	468
<i>Chicago, St. Louis &amp; Pittsburgh Railroad v. Spilker</i> , 134 Ind. 880	317	— <i>v. Jeffries</i> , 7 Allen, 548	236
<i>Choate v. Arrington</i> , 116 Mass. 552	82	— <i>v. Jeffs</i> , 14 Gray, 19	207
— <i>v. Jacobs</i> , 136 Mass. 297	43	— <i>v. Johnson</i> , 188 Mass. 882	521
<i>Christy v. Elliott</i> , 216 Ill. 31	316	— <i>v. Kane</i> , 108 Mass. 423	207
<i>Cincinnati, Indianapolis, St. Louis &amp; Chicago Railroad v. Cooper</i> , 120 Ind. 469	453	— <i>v. Kelley</i> , 177 Mass. 221	308
<i>Cincinnati Street Railway v. Wright</i> , 54 Ohio St. 181	819	— <i>v. —</i> , 184 Mass. 320	468
<i>Clark v. Labreche</i> , 63 N. H. 397	506	— <i>v. Kerrissey</i> , 141 Mass. 110	387
<i>Clegg v. Hands</i> , 44 Ch. D. 503	186	— <i>v. Lavery</i> , 188 Mass. 13	468
<i>Cleveland v. Clap</i> , 5 Mass. 201	481	— <i>v. Leavitt</i> , 12 Allen, 179	387
<i>Clifford v. Atlantic Cotton Mills</i> , 146 Mass. 47	443	— <i>v. McDonald</i> , 187 Mass. 581	468
<i>Cluff v. Mutual Benefit Ins. Co.</i> 13 Allen, 306	222	— <i>v. McKenna</i> , 158 Mass. 207	304
		— <i>v. Meserve</i> , 154 Mass. 64	486
		— <i>v. Miller</i> , 150 Mass. 69	520
		— <i>v. Morrison</i> , 134 Mass. 189	413
		— <i>v. Nickerson</i> , 5 Allen, 518	25
		— <i>v. Pear</i> , 183 Mass. 242	373
		— <i>v. Plaisted</i> , 148 Mass. 375	375, 549
		— <i>v. Quirk</i> , 155 Mass. 296	25
		— <i>v. Robinson</i> , 1 Gray, 555	520
		— <i>v. Sisson</i> , 189 Mass. 247	375
		— <i>v. Smith</i> , 141 Mass. 135	573
		— <i>v. —</i> , 166 Mass. 370	387
		— <i>v. Stahl</i> , 7 Allen, 304	387
		— <i>v. Strauss</i> , 191 Mass. 545	373, 610
		— <i>v. Tibbetts</i> , 157 Mass. 519	469

Commonwealth v. Tucker, 189 Mass. 467	469	Custy v. Donlan, 159 Mass. 245	582
— v. Warren, 161 Mass. 281	386	— v. Lowell, 117 Mass. 78	533
Commonwealth Ins. Co. v. Knabe Manuf. Co. 171 Mass. 265	220	Daggett v. Slack, 8 Met. 450	286
Conant v. Stratton, 107 Mass. 474	43	— v. Tracy, 128 Mass. 167	186
Congleton v. Pattison, 10 East, 180	185	Delay v. Savage, 145 Mass. 38	444
Conlin v. Aldrich, 98 Mass. 557	538	Dalton v. New York, New Haven, & Hartford Railroad, 184 Mass. 344	55
Consolidated Gas Co. v. Getty, 96 Md. 683	818	Dalton-Ingersoll Co. v. Fiske, 175 Mass. 15	457
Consolidated Ice Machine Co. v. Keifer, 184 Ill. 481	816	Damon v. Carrol, 163 Mass. 404	206
Consolidated Traction Co. v. Holmark, 31 Vroom, 466	319	Daniels v. Tearney, 102 U. S. 415	478
Cook v. Cook, 144 Mass. 168	596	Danolds v. State, 89 N. Y. 36	390
— v. Doggett, 2 Allen, 439	427, 466	Davies v. Mann, 10 M. & W. 546	452
— v. Shearman, 103 Mass. 21	582	Davis v. Central Congregational Society, 129 Mass. 367	149
Cooke v. Millard, 65 N. Y. 352	506	— v. Eastman, 1 Allen, 423	505
Copithorne v. Hardy, 178 Mass. 400	418	— v. Wakelee, 156 U. S. 680	478
Corcoran v. Boston, 185 Mass. 325	194, 587	Dawes v. Sweet, 14 Mass. 105	43
Corey v. Havener, 182 Mass. 260	821	Day v. Moore, 18 Gray, 522	304
Cornman v. Eastern Counties Railway, 4 H. & N. 781	847	Dean v. Pennsylvania Railroad, 129 Penn. St. 514	315
Corrigan v. Connecticut Ins. Co. 122 Mass. 298	517	— v. Williams, 17 Mass. 417	198
Corsiglia v. Burnham, 189 Mass. 817	413	De Las Casas, petitioner, 178 Mass. 213	411
Cortelyou v. Lowe, 111 Fed. Rep. 1005	616	—, 180 Mass. 471	411
Costello v. Crowell, 133 Mass. 352	62	Delaware, Lackawanna & Western Railroad v. Devore, 114 Fed. Rep. 155	320
Cotant v. Boone Suburban Railway, 125 Iowa, 46	350, 362	Demeritt v. Randall, 116 Mass. 331	25
Cottage Street Methodist Episcopal Church v. Kendall, 121 Mass. 528	494	DeMontague v. Bacharach, 181 Mass. 256	485
County Commissioners, petitioners, 193 Mass. 257	411	— v. —, 187 Mass. 128	279, 413, 485
Cowan v. Kirby, 180 Mass. 504	284	— v. New York, New Haven, & Hartford Railroad, 159 Mass. 532	250
— v. Muskegon Railway, 84 Mich. 583	314	— v. Parker, 14 Allen, 94	425
Cox v. South Shore & Boston Street Railway, 182 Mass. 497	77	Denny v. Williams, 5 Allen, 1	507
— v. Willey, 183 Mass. 410	507	Denver City Tramway Co. v. Norton, 141 Fed. Rep. 569	320
Crampton v. Ivie Bros. 126 N. C. 894	819	Devine v. Warner, 75 Conn. 375	506
Crawford v. Burke, 195 U. S. 176	43	Dexter v. Gardner, 7 Allen, 243	555
Creamer v. West End Street Railway, 156 Mass. 320	134	— v. Norton, 47 N. Y. 62	424
Creavin v. Newton Street Railway, 176 Mass. 529	813	Dickinson v. Boston, 188 Mass. 595	150
Cribbs v. Adams, 13 Gray, 597	592	— v. Todd, 172 Mass. 183	143
Crocker v. Dillon, 133 Mass. 91	397	Dickson v. Missouri Pacific Railway, 104 Mo. 491	318
Crocket v. Boston, 5 Cush. 182	494	Dobbins v. Los Angeles, 195 U. S. 223	376
Cromarty v. Boston, 127 Mass. 329	28	Dodge v. Boston & Bangor Steamship Co. 148 Mass. 207	346
Cromwell v. Norton, 193 Mass. 291	485	Doe v. Aldridge, 4 T. R. 264	554
Crowell v. Moley, 188 Mass. 116	562	Dolan v. Boott Cotton Mills, 185 Mass. 576	29, 126, 209
Cuddy v. Horn, 46 Mich. 596	315	Dolittle v. Eddy, 7 Barb. 74	583
Cummings v. Cummings, 146 Mass. 501	287	Dolphin v. Worcester Consolidated Street Railway, 189 Mass. 270	55
Cunningham v. Atlas Tack Co. 187 Mass. 51	498	Donaldson v. General Public Hospital, 30 N. B. 279	150
— v. Thief River Falls, 84 Minn. 21	318	Donnelly v. Boston Catholic Cemetery Association, 146 Mass. 163	149
Currier v. Williams, 189 Mass. 214	24, 437	Donovan v. Lynn & Boston Railroad, 185 Mass. 583	341
Cushing v. Worrick, 9 Gray, 382	308	Dorr v. Fisher, 1 Cush. 271	507
		— v. Schenck, 187 Mass. 542	24

Dougherty v. Greenwich Ins. Co. 85 Vroom, 716	568	Elyton Land Co. v. Mingea, 89 Ala. 521	815
Douglass v. Merchants' Ins. Co. 118 N. Y. 484	382	Emerson v. Milton Academy, 185 Mass. 414	178
Douglass Axe Manuf. Co. v. Gard- ner, 10 Cush. 88	507	Equitable Manuf. Co. v. Biggers, 121 Ga. 381	586
Dow v. State Bank, 88 Minn. 855	424	Evans v. Lake Erie & Western Railway, 78 Fed. Rep. 782	320
Dowd v. Boston & Albany Railroad, 162 Mass. 185	497	Evensen v. Lexington & Boston Street Railway, 187 Mass. 77	57, 313
Dowling v. Morrill, 165 Mass. 491	586	Falkins v. Boston Elevated Rail- way, 188 Mass. 153	349
Downes v. Harper Hospital, 101 Mich. 555	152	Farley v. Wilmington & Newcastle Electric Railway, 52 Atl. Rep. 543	319
Doyle v. Boston & Albany Railroad, 145 Mass. 386	417	Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206	877
— v. Fitchburg Railroad, 166 Mass. 492	434	Farnon v. Boston & Albany Rail- road, 180 Mass. 212	335
— v. West End Street Railway, 161 Mass. 533	67	Farwell v. Boston & Worcester Railroad, 4 Met. 49	151
Drake v. White, 117 Mass. 10	423	Faulkner v. Boston & Maine Rail- road, 187 Mass. 254	440
Driscoll v. West End Street Rail- way, 159 Mass. 142	57, 66, 516	Fay v. Hunt, 190 Mass. 378	536
Droncy v. Doherty, 186 Mass. 205	418	— v. Sears, 111 Mass. 154	481
Drummond v. Crane, 159 Mass. 577	18	— v. Upton, 153 Mass. 6	413
Dudley v. Jamaica Pond Aqueduct, 100 Mass. 183	278	Feital v. Middlesex Railroad, 109 Mass. 398	511
Dunbar v. Baker, 104 Mass. 211	457	Felt v. Boston & Maine Railroad, 161 Mass. 311	77
— v. Dunbar, 180 Mass. 170	290	Ferguson v. Union Ins. Co. 187 Mass. 8.	222
Duncklee v. Webber, 151 Mass. 408	186	Ferris v. Van Ingen, 110 Ga. 102	18
Dunn v. Boston & Northern Street Railway, 189 Mass. 62	364	Ferry v. Ferry, 2 Cush. 92	193
— v. Sayles, Dav. & Mer. 579	382	— v. Laible, 4 Stew. (N. J.) 566	18
Durkee v. Gunn, 41 Kans. 496	17	Field v. Clark, 143 U. S. 649	375
Duval v. Atlantic Coast Line Rail- road, 184 N. C. 331	319	— v. Thompson, 119 Mass. 151	236
Dwight v. Boston, 12 Allen, 816	194	Finnegan v. Fall River Gas Works, 159 Mass. 311	283
Dyer v. Erie Railway, 71 N. Y. 228	318	— v. Winslow Skate Manuf. Co. 189 Mass. 580	418
— v. Osborne, 11 R. L. 321	196	Finnick v. Boston & Northern Street Railway, 190 Mass. 382	516
Dysart Peerage case, 6 App. Cas. 489	597	Fire Insurance Patrol v. Boyd, 120 Penn. St. 624	149
Earle v. Wood, 8 Cush. 430	555	Firemen's Ins. Co. v. Common- wealth, 137 Mass. 80	194
Easterby v. Sampson, 6 Bing. 644	185	Fitzgerald v. Allen, 128 Mass. 232	279
East Tennessee Land Co. v. Leeson, 183 Mass. 37	196	Flagg v. Worcester, 8 Cush. 69	533
East Tennessee, Virginia & Georgia Railway v. Morristown, 85 S. W. Rep. 771	301	Flanders v. Cross, 10 Cush. 514	276
Edwards v. Bruorton, 184 Mass. 529	479	Fletcher v. Boston & Maine Rail- road, 1 Allen, 9	362
— v. Grand Trunk Railway, 48 Maine, 379	506	— v. —, 187 Mass. 465	455
Egbert v. Greenwalt, 44 Mich. 245	597	Flint v. Norwich & New York Trans- portation Co. 6 Blatchf. 158	847
Eighmy v. Union Pacific Railway, 93 Iowa, 538	152	— v. —, 7 Blatchf. 536	317
Ellinger v. Philadelphia, Wilming- ton & Baltimore Railroad, 153 Penn. St. 213	347	— v. —, 34 Conn. 554	347
Elliot v. Fitchburg Railroad, 10 Cush. 191	160	— v. —, 13 Wall. 3	347
Elliott v. Crutchley, [1903] 2 K. B. 476	424	Flood v. Leahy, 183 Mass. 232	410
— v. —, [1904] 1 K. B. 555	424	Fontaine v. Bush, 40 Minn. 141	506
Ellis v. Lynn & Boston Railroad, 160 Mass. 341	517	Footo v. Gibbs, 1 Gray, 412	35
— v. Thayer, 183 Mass. 309	418	Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214	150
		Foster v. Hall, 12 Pick. 89	304



Foster v. New York, New Haven, & Hartford Railroad, 187 Mass. 21		Gould v. Day, 94 U. S. 405	406
Foternick v. Watson, 184 Mass. 187	361	— v. Hartley, 187 Mass. 561	238
Fowler v. Brooks, 188 Mass. 64	427	— v. Thompson, 4 Met. 224	587
— v. Tuttle, 24 N. H. 9	538	Grace v. Adams, 100 Mass. 605	536
Fox v. Michigan Central Railroad, 188 Mich. 483	308	Graeff v. Philadelphia & Reading Railroad, 161 Penn. St. 230	347
Foye v. Patch, 132 Mass. 105	453	Graham v. Badger, 164 Mass. 42	417
Franke v. Mann, 106 Wis. 118	36	— v. Middleby, 185 Mass. 349	517
Freeland v. Hastings, 10 Allen, 570	51	Grapel v. Hodges, 112 N. Y. 419	18
French v. Jones, 191 Mass. 522	410	Gray v. Boston, 15 Pick. 376	195
— v. McKay, 181 Mass. 485	540	— v. Gardner, 17 Mass. 188	303
Frostburg Mining Co. v. New England Glass Co. 9 Cush. 115	586	Green v. Kelly, Spencer, 544	426
Frothingham v. Shaw, 175 Mass. 59		— v. Los Angeles Terminal Railway, 148 Cal. 31	452
Fuller v. New York, New Haven, & Hartford Railroad, 175 Mass. 424	506	Griffin v. Boston & Albany Railroad, 148 Mass. 148	417
Furneaux v. Esterly, 86 Kans. 589	195	Griffith v. Baltimore & Ohio Railroad, 44 Fed. Rep. 574	320
	586	Griswold v. Boston & Maine Railroad, 183 Mass. 434	284
Gaither v. Green, 40 La. Ann. 862	308	Grocers' Bank v. Kingman, 16 Gray, 478	69
Galbraith v. West End Street Railway, 165 Mass. 572	55, 516	Guild v. Bonnemort, 156 Mass. 522	529
Gallary v. Holland, 15 Gray, 50	629		
Galligan v. Old Colony Street Railway, 182 Mass. 211	511	Hack v. Nason, 190 Mass. 346	209
Galveston, Harrisburg & San Antonio Railway v. Kutac, 72 Texas, 643		Haddock v. Boston & Maine Railroad, 8 Allen, 298	597
Garity v. Gigie, 130 Mass. 184	319	Hagar v. Buck, 44 Vt. 285	186
Garlick v. Bartlett, 4 Allen, 365	79	Hager v. Shindler, 29 Cal. 47	304
Garry v. Boston, 161 Mass. 530	529	Hajsek v. Chicago, Burlington & Quincy Railroad, 68 Neb. 539	319
Gaskin v. Balls, 18 Ch. D. 824	538	Hale v. New York, New Haven, & Hartford Railroad, 190 Mass. 84	362
Gately v. Old Colony Railroad, 171 Mass. 494	849	Haley v. Boston, 191 Mass. 291	150
Gaynor v. Old Colony & Newport Railway, 100 Mass. 208	28	Hall v. County Commissioners, 10 Allen, 100	527
George v. Haverhill, 110 Mass. 506	229	— v. Hall, 140 Mass. 267	287
Gibbons v. Williams, 135 Mass. 833	506	— v. Ripley, 119 Mass. 185	451
Gibbs v. Benjamin, 45 Vt. 124	358	— v. Wisconsin, 105 U. S. 5	389
— v. Consolidated Gas Co. 130 U. S. 396	283	Halloran v. Worcester Consolidated Street Railway, 192 Mass. 104	313
Gibson v. Leonard, 148 Ill. 182	457	Ham v. Boston Board of Police, 142 Mass. 90	549
Gilchrist v. Cowley, 181 Mass. 290	82	Hampel v. Detroit, Grand Rapids & Western Railroad, 188 Mich. 1	314
Gillingham v. Brown, 178 Mass. 417	558	Handy v. Canning, 166 Mass. 107	220
Glaaspy v. Cabot, 185 Mass. 435		Harper v. Hassard, 113 Mass. 187	882
Glass v. Bennett, 89 Tenn. 478	150	Harriman v. Woburn Electric Light Co. 163 Mass. 85	195
Glavin v. Rhode Island Hospital, 12 R. I. 411	362	Harrington v. Glidden, 179 Mass. 486	276
Gleason v. Worcester Consolidated Street Railway, 184 Mass. 290	426	Harris v. Great Barrington, 169 Mass. 271	4
Glynn v. Central Railroad, 175 Mass. 510	505	— v. Newbury, 128 Mass. 321	4
Goddard v. Bedout, 40 Ind. 114	290	Harrison v. Phillips Academy, 12 Mass. 466	405
— v. Binney, 115 Mass. 450	597	Harvard College v. Cambridge, 175 Mass. 145	178
Goding v. Rosenthal, 180 Mass. 48	283	Harvey v. Murray, 186 Mass. 377	391, 423
Goodright v. Moss, Corp. 591	157	Harvey-Watts Co. v. Worcester Umbrella Co. 193 Mass. 138	256
Gordon v. Cummings, 152 Mass. 513	427	Hatton v. Robinson, 14 Pick. 416	804
— v. West End Street Railway, 175 Mass. 181		Haven v. Adams, 8 Allen, 363	35, 186
Gormley v. Kyle, 137 Mass. 189			
Gould v. Boston Duck Co. 13 Gray, 442			
— v. Boston Elevated Railway, 191 Mass. 396			

Hawley v. Smith, 45 Ind. 183	18	Holland v. West End Street Rail- way, 155 Mass. 387	458
Hayes v. Cambridge, 136 Mass. 402	599	Hollywood v. First Parish in Brock- ton, 192 Mass. 269	183
—— v. Jackson, 159 Mass. 451	446	Holmes v. Hunt, 122 Mass. 505	236
Hayward v. Eliot National Bank, 96 U. S. 611	574	Holt v. Silver, 169 Mass. 435	189
Hazard Powder Co. v. Somersville Manuf. Co. 78 Conn. 171	157	Holtz v. Dick, 42 Ohio St. 23	558
Heard v. Pictorial Press, 182 Mass. 530	146	Honey v. Chicago, Burlington & Quincy Railway, 59 Fed. Rep. 427	320
Hearns v. Waterbury Hospital, 66 Conn. 98	152	Hooe v. Boston & Northern Street Railway, 187 Mass. 67	125
Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co. 77 Fed. Rep. 238	611	Hooper v. Cox, 117 Mass. 1	206
Heaven v. Pender, 11 Q. B. D. 503	350, 363	—— v. Jellison, 22 Pick. 250	85
Hector v. Boston Electric Light Co. 161 Mass. 558	487	Hosmer v. Hoitt, 161 Mass. 173	457
Hedge v. Drew, 12 Pick. 141	405	Hot Springs Street Railroad v. Hil- dreth, 72 Ark. 572	316
Heim v. Chapman, 171 Mass. 347	581	Houfe v. Fulton, 29 Wis. 296	314
Hemmenway v. Towner, 1 Allen, 209	596	Houghton v. Kendall, 7 Allen, 72	286
Henderson Bridge Co. v. Henderson, 173 U. S. 592	194	Howard v. Borden, 13 Allen, 299	507
Hendrick v. West Springfield, 107 Mass. 541	262	—— v. Gage, 6 Mass. 462	575
Hennessey v. Taylor, 189 Mass. 583	4, 54, 66, 516	—— v. Harris, 8 Allen, 297	109
Heriot's Hospital v. Ross, 12 CL & F. 507	152	Howe v. Ray, 113 Mass. 88	437
Hewes v. Jordan, 39 Md. 472	506	—— v. Walker, 4 Gray, 318	446
Hibbard v. Thompson, 109 Mass. 286	451	Howell v. Coupland, 1 Q. B. D. 258	426
Hibernia Fire Engine Co. v. Com- monwealth, 93 Penn. St. 204	576	—— v. Union Traction Co. 202 Penn. St. 338	440
Hickey v. Boston & Lowell Railroad, 14 Allen, 429	455	Howland v. Leach, 11 Pick. 151	427
Hilborn v. Boston & Northern Street Railway, 191 Mass. 14	349	—— v. Union Street Railway, 150 Mass. 86	66
Hill v. Boston, 122 Mass. 344	150	Hoyt v. Robinson, 10 Gray, 371	481
—— County Commissioners, 4 Gray, 414	574	Hubbard v. Fitzsimmons, 57 Ohio St. 436	411
—— v. Greenwood, 160 Mass. 256	413	—— v. Lamburn, 189 Mass. 296	414
—— v. Iver Johnson Sporting Goods Co. 188 Mass. 75	440	Hudson v. Lynn & Boston Railroad, 185 Mass. 510	453
—— v. McDonald, 17 Wis. 97	506	Huling v. Huling, 32 Ill. App. 519	558
—— v. Seekonk, 119 Mass. 85	5	Hull. In re, [1905] 1 K. B. 588	424
Hillier v. Farrell, 185 Mass. 434	52	—— v. Westfield, 133 Mass. 433	533
Hills v. Jones, 122 Mass. 412	206	Hunt v. Perry, 165 Mass. 287	195
Hinckley v. Somerset, 145 Mass. 326	478	—— v. Rousmanier, 8 Wheat. 174	10
Hingham & Quincy Bridge v. County of Norfolk, 6 Allen, 353	478	Hurd v. Curtis, 19 Pick. 459	185
Hittinger v. Westford, 135 Mass. 258	276, 545	Hutcheson v. Peck, 5 Johns. 196	558
Hodgkins v. Price, 141 Mass. 162	198	Hydes Ferry Turnpike Co. v. Yates, 67 S. W. Rep. 69	319
Hofnauer v. R. H. White Co. 186 Mass. 47	418	Illinois Central Railroad v. McLeod, 78 Miss. 334	819
Hogan v. Collins, 183 Mass. 43	573	Indianapolis & Cincinnati Railroad v. Wright, 22 Ind. 376	452
Holbrook v. Clapp, 105 Mass. 563	293	Indianapolis Street Railway v. John- son, 163 Ind. 518	317
—— v. Gay, 6 Cush. 215	304	Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551	452
—— v. Harrington, 16 Gray, 102	286	International Paper Co. v. Gazette Co. 182 Mass. 578	145
Holden v. Missouri Railroad, 177 Mo. 456	318	Irwin v. Alley, 158 Mass. 249	77
—— v. Prudential Ins. Co. 191 Mass. 153	221	Isbell v. New York & New Haven Railroad, 27 Conn. 393	452
		Jackson v. Phillips, 14 Allen, 539	149, 558
		—— v. Stevenson, 156 Mass. 496	119
		Jacobs, In re, 98 N. Y. 98	376
		—— v. Carpenter, 161 Mass. 16	581
		—— v. Warfield, 23 La. Ann. 395	323

<i>Jacobs v. West End Street Railway</i> , 178 Mass. 116	347, 440	<i>Knight v. Boston</i> , 159 Mass. 551	194
<i>Jacobson v. Massachusetts</i> , 197 U. S. 11	376	— <i>v. Mann</i> , 118 Mass. 148	507
<i>James v. Spaulding</i> , 4 Gray, 451	286	— <i>v. Overman Wheel Co.</i> 174 Mass. 455	105, 497
<i>Janin v. Browne</i> , 59 Cal. 37	17	— <i>v. Peacock</i> , 116 Mass. 862	112
<i>Jennings v. Rooney</i> , 188 Mass. 577	220, 521	<i>Knightstown v. Musgrove</i> , 116 Ind. 121	316
<i>Jewett v. Draper</i> , 6 Allen, 434	303	<i>Kohn v. Lovett</i> , 44 Ga. 251	288
<i>J. H. Wentworth Co. v. French</i> , 176 Mass. 442	574	<i>Kollock, In re</i> , 165 U. S. 526	375
<i>Joel v. Woman's Hospital</i> , 35 N. Y. Supp. 37	12	<i>Koplit v. St. Paul</i> , 86 Minn. 373	318
<i>Johnson v. Cuttle</i> , 105 Mass. 447	505	<i>Krause v. Board of School Trustees</i> , 66 N. E. Rep. 1010	424
— <i>c. Kimball</i> , 170 Mass. 58	551	<i>Krauss v. Cope</i> , 180 Mass. 22	220
— <i>v. Mutual Ins. Co.</i> 180 Mass. 407	221	<i>Krell v. Henry</i> , [1908] 2 K. B. 740	424
— <i>v. St. Joseph</i> , 96 Mo. App. 603	318	<i>Kyte v. Commercial Union Assur. Co.</i> 144 Mass. 48	536
— <i>v. Walker</i> , 155 Mass. 253	575	<i>La Grange v. State Treasurer</i> , 24 Mich. 468	575
<i>Jones v. Mechanics Bank</i> , 29 Md. 287	506	<i>Lahti v. Fitchburg &amp; Leominster Street Railway</i> , 172 Mass. 147	57
— <i>v. Parker</i> , 168 Mass. 564	186	<i>Lake Shore &amp; Michigan Southern Railway v. McIntosh</i> , 140 Ind. 261	817
<i>Jordan v. Dayton</i> , 4 Ohio, 294	610	— <i>v. Miller</i> , 25 Mich. 274	814
— <i>v. Osgood</i> , 109 Mass. 457	222	<i>Lamb v. Worcester</i> , 177 Mass. 82	600
<i>Joelyn v. Milford, Holliston &amp; Framingham Street Railway</i> , 184 Mass. 65	184	<i>Lancy v. Boston</i> , 185 Mass. 219	380, 582
<i>Kabley v. Worcester Gas Light Co.</i> 102 Mass. 392	186	<i>Langdon v. Hughes</i> , 107 Mass. 272	236
<i>Kaiser v. Alexander</i> , 144 Mass. 71	236	<i>Larcom v. Olin</i> , 160 Mass. 102	377
<i>Kane v. Boston Elevated Railway</i> , 192 Mass. 386	318	<i>Lawton v. Steele</i> , 152 U. S. 133	376
<i>Karce v. Covell</i> , 180 Mass. 206	425	<i>Leach v. Goode</i> , 19 Mo. 501	391
<i>Karrigan v. West End Street Railway</i> , 158 Mass. 305	516	<i>Learoyd v. Godfrey</i> , 138 Mass. 815	283
<i>Keen v. Baltimore &amp; Ohio Railroad</i> , 61 Md. 154	453	<i>Leavenworth v. Hatch</i> , 57 Kans. 57	371
<i>Keefe v. Chicago &amp; Northwestern Railway</i> , 92 Iowa, 182	452	<i>Le Baron v. Crombie</i> , 14 Mass. 234	304
<i>Keeney &amp; Wood Manuf. Co. v. Union Manuf. Co.</i> 39 Conn. 576	158	<i>LeBlanc v. Lowell, Lawrence &amp; Haverhill Street Railway</i> , 170 Mass. 564	318
<i>Kelley v. Kelley</i> , 161 Mass. 111	592	<i>Leddy v. Barney</i> , 139 Mass. 394	57
— <i>v. Thompson</i> , 181 Mass. 122	293	<i>Lee v. Tarplin</i> , 188 Mass. 52	521
<i>Kelly v. Blackstone</i> , 147 Mass. 448	5	<i>Lees v. Whitcomb</i> , 5 Bing. 34	382
— <i>v. Wakefield &amp; Stoneham Street Railway</i> , 179 Mass. 542	57	<i>Leland v. Kingsbury</i> , 24 Pick. 315	43
<i>Kent v. Dunham</i> , 142 Mass. 216	553	<i>Lemey v. Boston &amp; Maine Railroad</i> , 167 Mass. 254	418
— <i>v. Garvin</i> , 1 Gray, 143	226	<i>Lemon v. Newton</i> , 184 Mass. 476	410
<i>Keough v. Aldermen of Holyoke</i> , 156 Mass. 403	573	<i>Leonard v. Eldridge</i> , 184 Mass. 594	585
<i>Kerr v. Boston Elevated Railway</i> , 188 Mass. 434	517	— <i>v. Storer</i> , 115 Mass. 86	444
<i>Kerse v. Miller</i> , 169 Mass. 44	189	<i>Lerow v. Wilmarrh</i> , 7 Allen, 468	581
<i>Kerslake v. Cummings</i> , 180 Mass. 65	888	<i>Leslie v. Lorillard</i> , 110 N. Y. 519	858
<i>Kidder v. United Order of the Golden Cross</i> , 192 Mass. 326	222	<i>Levers v. Van Buskirk</i> , 4 Penn. St. 309	804
<i>Kiernan v. Linnehan</i> , 151 Mass. 543	587	<i>Lewis v. Chapman</i> , 3 Beav. 183	119
<i>King v. Cross</i> , 175 U. S. 396	79	— <i>v. Denney</i> , 4 Cush. 588	85
— <i>v. Ham</i> , 6 Allen, 298	82	<i>Lightfoot v. Winnebago Traction Co.</i> 123 Wis. 479	814
— <i>v. Savage</i> , 121 Mass. 803	287	<i>Lincoln v. Worcester</i> , 8 Cush. 55	527
<i>Kingman, petitioner</i> , 153 Mass. 566	375, 411	<i>Lindsey v. Leighton</i> , 160 Mass. 285	94
— <i>v. Tirrell</i> , 11 Allen, 97	437	<i>Little v. Central District &amp; Printing Telegraph Co.</i> 213 Penn. St. 229	315
		— <i>v. Hackett</i> , 116 U. S. 366	312
		<i>Littlefield v. Allis Co.</i> 177 Mass. 151	126
		<i>Lloyd v. Wright</i> , 25 Ga. 215	506
		<i>Locke v. Selectmen of Lexington</i> , 122 Mass. 250	377
		<i>Lockhart v. Lichtenthaler</i> , 46 Penn. St. 151	315

Longley v. Cleavland, 133 Mass. 256	207	Makepeace v. Rogers, 4 DeG., J. & S. 649	256
Loud v. Barnes, 164 Mass. 344	142	Malcolm v. Fuller, 162 Mass. 160	106
Louisville, New Albany & Chicago Railway v. Creek, 180 Ind. 139	817	Manning v. West End Street Railway, 166 Mass. 230	417
Louisville Railway v. Anderson, 76 S. W. Rep. 163	317	Marble v. Ross, 124 Mass. 44	450
Lovett v. Salem & South Danvers Railroad, 9 Allen, 557	452	Marion Beneficial Society v. Commonwealth, 31 Penn. St. 82	576
Low v. Innes, 4 DeG., J. & S. 286	186	Marshall v. Ipswich, 110 Mass. 522	4
Lowe v. Harwood, 139 Mass. 133	427	Martin v. New York Ins. Co. 148 N. Y. 117	382
Lowell v. Oliver, 8 Allen, 247	409	—— v. Portland, 81 Maine, 293	540
Lowell Trust Co. v. Pratt, 183 Mass. 379	592	Marvel v. Phillips, 162 Mass. 399	17, 428
Luce v. Parsons, 192 Mass. 8	487	Mason v. Boston & Northern Street Railway, 190 Mass. 255	511
Lufkin v. Jakeman, 188 Mass. 523	20	—— v. Pomeroy, 151 Mass. 164	18
Lunt v. Davison, 104 Mass. 498	575	Massachusetts General Hospital v. Somerville, 101 Mass. 819	178
Lyman v. Amherst, 107 Mass. 389	4	Masterson v. New York Central & Hudson River Railroad, 84 N. Y. 247	318
Lynde v. Brown, 143 Mass. 337	388	Masury v. Southworth, 9 Ohio St. 340	186
Lynn v. Hooper, 93 Maine, 46	102	Mathes v. Lowell, Lawrence & Haverhill Street Railway, 177 Mass. 416	77
Lyon v. Cunningham, 136 Mass. 532	587	Maxwell v. Brown, 39 Maine, 98	506
McAlister v. Burgess, 161 Mass. 269	555	May v. Hammond, 146 Mass. 439	206
McCann v. Pennie, 100 Cal. 547	18	Mechanics Bank v. Merchants Bank, 6 Met. 13	592
McCarthy v. Boston Elevated Railway, 187 Mass. 498	57	Mehan v. Lowell Electric Light Co. 192 Mass. 58	418
—— v. Street Commissioners, 188 Mass. 338	575	Meigs v. Dexter, 172 Mass. 217	405
McCormick Harvesting Machine Co. v. Allison, 116 Ga. 445	536	Melvin v. Pennsylvania Steel Co. 180 Mass. 196	126, 417
McCoy v. Metropolitan Ins. Co. 133 Mass. 82	221	Memphis & Charleston Railroad v. Martin, 131 Ala. 269	452
McCrohan v. Davison, 187 Mass. 466	54	Menard v. Boston & Maine Railroad, 160 Mass. 396	56
McDermott v. Boston Elevated Railway, 184 Mass. 126	64, 65	Merriam v. Bayley, 1 Cush. 77	581
McDonald v. Massachusetts General Hospital, 120 Mass. 482	149	Mersey Docks v. Gibbs, L. R. 1 H. L. 93	150
McGearty v. Manhattan Railway, 15 App. Div. (N. Y.) 2	347	Metropolitan Street Railroad v. Powell, 89 Ga. 601	319
McGrath v. Seagrave, 2 Allen, 443	206	Michigan City v. Boeckling, 122 Ind. 89	317
McGregory v. Prescott, 5 Cush. 67	303	Miles v. Boyden, 3 Pick. 213	48
McGuinness v. Worcester, 160 Mass. 272	4	Milk v. Middlesex Railroad, 99 Mass. 167	522
McInnis v. Boston Elevated Railway, 190 Mass. 386	63	Millard v. Brayton, 177 Mass. 533	220
McKay v. Hand, 168 Mass. 270	89	Miller v. New York, New Haven, & Hartford Railroad, 175 Mass. 868	91
McKeon v. New York, New Haven, & Hartford Railroad, 183 Mass. 271	452	—— v. Roberts, 169 Mass. 134	298
McKernan v. Detroit Citizens' Street Railway, 188 Mich. 519	314	Mills v. Armstrong, 18 App. Cas. 1	314
McKim v. Harwood, 129 Mass. 76	42	—— v. Gore, 20 Pick. 28	405
McLean v. Richardson, 127 Mass. 339	505	Mink v. State, 60 Wis. 583	597
McMahon v. McHale, 174 Mass. 320	74	Minne v. Billings, 183 Mass. 126	140, 563
McNeil v. Boston Ice Co. 173 Mass. 570	66	Minot v. Attorney General, 189 Mass. 176	149
McPhee v. New England Structural Co. 188 Mass. 141	496	Missouri, Kansas & Texas Railway v. Rogers, 91 Texas, 52	319
Mack v. Shawangunk, 90 N. Y. Supp. 760	319	Montgomery v. Pickering, 116 Mass. 227	142
Maguire v. Fitchburg Railroad, 146 Mass. 379	250	Moody v. Boston & Maine Railroad, 139 Mass. 277	450
Mahar v. Steuer, 170 Mass. 454	74		
Maher v. Boston & Albany Railroad, 158 Mass. 36	250		

Moody v. Springfield Street Rail- way, 182 Mass. 168	511	Needham v. Wellesley, 189 Mass. 372	262
Mooney v. Connecticut River Lum- ber Co. 154 Mass. 407	418	Nelson v. State Board of Health, 186 Mass. 830	375
Moors v. Moors, 121 Mass. 282	596	Neasbit v. Garner, 75 Iowa, 814	317
— v. Street Commissioners, 134 Mass. 431	527	Newburyport v. County Commis- sioners, 12 Met. 211	527
Morey v. Gloucester Street Rail- way, 171 Mass. 164	565	Newcomb v. Boston Protective De- partment, 146 Mass. 598	450
— v. Whittenton Mills, 8 Cush. 374	529	— v. Williams, 9 Met. 525	48
Morgan v. Hymer, 18 Ky. L. R. 639	428	New England Ins. Co. v. Wing, 191 Mass. 192	301
— v. Wordell, 178 Mass. 850	290	New Orleans, St. Louis & Chicago Railroad v. Burke, 53 Miss. 200	847
Morris v. Metropolitan Street Rail- way, 63 App. Div. (N. Y.) 78	318	Newton v. Baker, 125 Mass. 80	142
Morse, petitioner, 18 Pick. 448	575	— v. Newton, 46 Minn. 83	18
— v. Aldrich, 19 Pick. 449	186	New York Health Department v. Trinity Church, 145 N. Y. 32	376
— v. Hill, 136 Mass. 60	574	New York Ins. Co. v. Armstrong, 117 U. S. 591	222
Morton v. Dean, 18 Met. 385	446	New York, Lake Erie & Western Railroad, r. New Jersey Electric Railway, 31 Vroom, 838	319
Mount Hermon Boys' School v. Gill, 145 Mass. 139	178	— v. Steinbrenner, 18 Vroom, 161	319
Moylan v. D. S. McDonald Co. 188 Mass. 499	419	Nicholls v. Great Western Railway, 27 U. C. (Q. B.) 382	822
Moynihan v. Hills Co. 146 Mass. 586	125, 418	Nichols v. Lynn & Boston Railroad, 168 Mass. 538	346
— v. Todd, 188 Mass. 301	160	Noonan v. Consolidated Traction Co. 35 Vroom, 679	319
Mugford v. Boston & Maine Rail- road, 173 Mass. 10	544	Norcross v. Crabtree, 161 Mass. 55	457
Muhlhaus v. Monongahela Street Railway, 201 Penn. St. 237	847	Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894] A. C. 535	858
Mullen v. Owosso, 100 Mich. 108	814	Northwestern Railway v. Whinray, 10 Exch. 77	69
— v. Springfield Street Rail- way, 164 Mass. 450	565	Norwood v. New York & New Eng- land Railroad, 161 Mass. 259	260
Munroe v. Carlisle, 176 Mass. 199	444	Nourse v. Jennings, 180 Mass. 592	536
Murdock Parlor Grate Co. v. Com- monwealth, 152 Mass. 28	75	— v. Nourse, 116 Mass. 101	406
Murphy v. Boston & Albany Rail- road, 167 Mass. 64	77	Noyes v. Boscawen, 64 N. H. 361	318
— v. Boston Elevated Railway, 188 Mass. 8	65, 565	Nugent v. Greenfield Life Assoc. 172 Mass. 278	221
— v. City Coal Co. 172 Mass. 824	106	Nye v. Storer, 168 Mass. 53	212
— v. Collins, 121 Mass. 6	592	Oakdale Manuf. Co. v. Garst, 18 R. I. 484	358
— v. Deane, 101 Mass. 455	450	Oak Island Hotel Co. v. Oak Island Grove Co. 165 Mass. 260	565
— v. Marston Coal Co. 183 Mass. 385	180	Oakman v. Belden, 94 Maine, 280	558
— v. New York, New Haven, & Hartford Railroad, 187 Mass. 18	497	Obertoni v. Boston & Maine Rail- road, 186 Mass. 481	440
Murray v. Boston Ice Co. 180 Mass. 165	312, 383	Obery v. Lander, 179 Mass. 125	505
— v. Milner, 12 Ch. D. 845	597	O'Brien v. Blue Hill Street Rail- way, 186 Mass. 446	515
— v. Stevens, 110 Mass. 95	574	— v. Hudner, 182 Mass. 381	66
Nash v. Commonwealth, 174 Mass. 335	408	— v. Woburn, 184 Mass. 598	599
— v. Minnesota Title Ins. & Trust Co. 163 Mass. 574	146	Ocean Ins. Co. v. Portsmouth Marine Railway, 3 Met. 420	79
National Bank of Commerce v. Hunt- ington, 129 Mass. 444	79	O'Connell, petitioner, 174 Mass. 253	24
— v. New Bedford, 153 Mass. 313	195	Odell v. Odell, 10 Allen, 1	149
National Enameling & Stamping Co. v. Haberman, 120 Fed. Rep. 415	358	O'Dowd v. Boston, 149 Mass. 443	549
Neal v. Rendall, 98 Maine, 69	317	O'Driscoll v. Lynn & Boston Rail- road, 180 Mass. 187	220
		O'Grady v. O'Grady, 162 Mass. 200	293

Old Colony Railroad v. Wilder, 137 Mass. 536	276	People v. Supervisors of Richmond, 28 N. Y. 112	575
Olds v. City Trust Co. 185 Mass. 500	193	— v. Sutton, 88 Hun, 173	540
Old South Society v. Crocker, 119 Mass. 1	555	Pepke v. Grace Hospital, 130 Mich. 498	152
Olivieri v. Atkinson, 168 Mass. 28	143	Perry v. House of Refuge, 63 Md. 20	149
Olsen v. Andrews, 168 Mass. 261	55	Peterson v. Morgan Spring Co. 189 Mass. 576	419
Olson v. Luck, 103 Wis. 33	814	— v. Waltham, 150 Mass. 564	532
Omaha & Republican Valley Railway v. Talbot, 48 Neb. 627	819	Phelps v. Davis, 6 Allen, 287	206
O'Neil v. O'Leary, 164 Mass. 387	497	Philadelphia & Reading Railroad v. Boyer, 97 Penn. St. 91	815
Onset Street Railway v. County Commissioners, 154 Mass. 396	533	Phillips v. Allen, 2 Allen, 453	597
Opinion of the Justices, 186 Mass. 603	408	— v. Boston, 150 Mass. 491	549
Orr v. Ward, 73 Ill. 318	382	— v. New York Central & Hudson River Railroad, 127 N. Y. 657	318
Orth v. Boston Elevated Railway, 188 Mass. 427	57	Phillips Academy v. Andover, 175 Mass. 118	178
Osgood v. Kezar, 138 Mass. 357	207	Phinixy v. Guernsey, 111 Ga. 346	424
— v. Rogers, 186 Mass. 238	149, 554	Pickett v. Walsh, 192 Mass. 572	397
Ostrander, In re, 12 Misc. (N. Y.) 476	540	Pierce v. Cunard Steamship Co. 153 Mass. 87	451
Otis v. Janesville, 47 Wis. 422	314	— v. Lamper, 141 Mass. 20	100
Otis Co. v. Ware, 8 Gray, 509	176	— v. O'Brien, 189 Mass. 58	517
Oulighan v. Butler, 189 Mass. 287	188, 321	Pinney v. Hall, 156 Mass. 225	418
Ouverson v. Grafton, 5 No. Dak. 281	819	Pittsburg & Connellsville Railroad v. Pillow, 76 Penn. St. 510	347
Packard v. Kingman, 109 Mich. 497	18	Pittsburg, Fort Wayne & Chicago Railway v. Hinds, 53 Penn. St. 512	347
Packer v. Thomson-Houston Electric Co. 175 Mass. 496	63	Poland v. Beal, 192 Mass. 559	143, 256
Paine v. Moffit, 11 Pick. 496	43	Pollock v. Pollock, 9 Misc. (N. Y.) 82	558
Palmer v. Gordon, 173 Mass. 410	452	Poor v. Sears, 154 Mass. 539	350, 364
— v. State, 39 Ohio St. 236	613	Pope v. Leonard, 115 Mass. 286	574
Paquette v. Prudential Ins. Co. 193 Mass. 215	437	Porter v. United States Ins. Co. 160 Mass. 183	536
Parker v. Barnard, 135 Mass. 116	283	Post v. Boston, 141 Mass. 180	598
— v. Commonwealth, 178 Mass. 199	373	Powers v. Boston, 154 Mass. 60	4, 512
— v. May, 5 Cush. 336	555	— v. Boston & Maine Railroad, 175 Mass. 466	240
— v. Way, 16 N. H. 45	597	— v. Massachusetts Homœopathic Hospital, 109 Fed. Rep. 294	149
Patten v. Deshon, 1 Gray, 325	185	Pratt v. Pratt, 157 Mass. 503	596
Patterson v. Kentucky, 97 U. S. 501	609	— v. Russell, 7 Cush. 462	581
Patton v. Gilmer, 42 Ala. 548	390	— v. Street Commissioners, 139 Mass. 559	283
Payne v. Williams, 4 Baxt. 583	558	— v. Tuttle, 136 Mass. 233	256
Payson v. Macomber, 8 Allen, 69	532	Prendible v. Connecticut River Manuf. Co. 160 Mass. 131	105
Peabody v. Fellows, 177 Mass. 290	293	Prescott v. Parker, 14 Mass. 429	43
Peal v. Trull, 178 Mass. 450	485	Preston v. Henshaw, 192 Mass. 84	205
People v. Barker, 158 N. Y. 98	391	Price v. Price, 91 Iowa, 693	559
— v. Board of Public Parks, 17 N. Y. Supp. 589	540	— v. United States, 165 U. S. 811	468
— v. D'Oench, 111 N. Y. 359	378	Prideaux v. Mineral Point, 43 Wis. 513	814
— v. Gillson, 109 N. Y. 389	376	Prince v. Crocker, 166 Mass. 347	410
— v. Hayes, 94 N. Y. Supp. 754	540	Proctor v. Stone, 158 Mass. 564	533
— v. McCreery, 84 Cal. 432	195	Putnam v. Broadway & Seventh Avenue Railroad, 55 N. Y. 108	347
— v. Morton, 24 App. Div. (N. Y.) 563	540, 576	Pyle v. Clark, 75 Fed. Rep. 644	320
— v. Musical Protective Union, 118 N. Y. 101	576	— v. —, 79 Fed. Rep. 744	320
— v. Russell, 49 Mich. 617	613		
— v. State Treasurer, 24 Mich. 468	574		
— v. Stephens, 71 N. Y. 527	389		

Quimby v. Boston & Maine Railroad, 160 Mass. 365	484	St. Germain v. Fall River, 177 Mass. 550	4
Quinn v. Boston Elevated Railway, 188 Mass. 478	341	St. Paul's Church v. Attorney General, 164 Mass. 188	555
— v. Perham, 151 Mass. 162	94	Safford v. McDonough, 120 Mass. 200	505
Radley v. London & Northwestern Railway, 1 App. Cas. 754	452	Salem v. Maynes, 123 Mass. 372	373
Railroad Co. v. Kassen, 49 Ohio St. 230	452	Saltman v. Boston Elevated Railway, 187 Mass. 243	225, 340, 545
Railsback v. Railsback, 12 Ind. App. 659	559	Saltonstall v. Sanders, 11 Allen, 446	563
Raisch v. Board of Education, 81 Cal. 542	540	Sanders v. Palmer, 154 Mass. 476	599
Rand v. Newton, 6 Allen, 38	25	Savory v. Haverhill, 132 Mass. 824	600
— v. Sanger, 115 Mass. 124	287	Sawyer v. Boston, 144 Mass. 470	330
Randolph v. O'Riordan, 155 Mass. 331	312	— v. Cook, 188 Mass. 168	256
Ransom v. Boston, 192 Mass. 209	538	— v. Davis, 138 Mass. 239	373
— v. Mayor of Boston, 193 Mass. 537	551, 573	— v. Woodbury, 7 Gray, 499	35
Rawitzer v. St. Paul City Railway, 93 Minn. 84	452	Schenley's appeal, 70 Penn. St. 98	186
Redemptorist Fathers v. Boston, 129 Mass. 178	194	Schindler v. Milwaukee, Lake Shore & Western Railway, 87 Mich. 410	314
Redigan v. Boston & Maine Railroad, 155 Mass. 44	284	Schopman v. Boston & Worcester Railroad, 9 Cush. 24	362
Reed v. Reed, 114 Mass. 372	142	Searles v. Manhattan Railway, 101 N. Y. 661	440
— v. —, 6 Ind. App. 317	558	Sears v. Boston, 173 Mass. 71	328
Regan v. Howe, 121 Mass. 424	406	— v. Street Commissioners, 173 Mass. 360	409
Regina v. Williams, 1 C. & K. 195	469	Seele v. Boston & Northern Street Railway, 187 Mass. 248	516
Remick v. Sandford, 120 Mass. 309	506	Sewall v. Patch, 132 Mass. 326	83
Rice v. Rice, 104 Mich. 371	568	Shannon v. Frost, 3 B. Mon. 258	51
Richmond Traction Co. v. Martin, 102 Va. 209	452	Shapira v. D'Arcy, 180 Mass. 377	143
Robbins v. Fitchburg Railroad, 161 Mass. 145	313	Shattuck v. Eldredge, 173 Mass. 165	517
— v. Springfield Street Railway, 165 Mass. 80	516	Shaw v. City Council of Marshalltown, 104 N. W. Rep. 1121	540
Robertson v. Boston & Albany Railroad, 160 Mass. 191	368	Shea v. Boston & Maine Railroad, 154 Mass. 81	77
Robinson v. Brown, 182 Mass. 266	83	Shearer v. Buckley, 31 Wash. 370	319
— v. Metropolitan Street Railway, 91 App. Div. (N. Y.) 158	318	Sheffield v. Central Union Telephone Co. 36 Fed. Rep. 164	320
— v. —, 179 N. Y. 593	318	Sheldon v. Hamilton, 22 R. I. 230	391
— v. New York Central & Hudson River Railroad, 86 N. Y. 11	818	Shepard v. Boston & Maine Railroad, 158 Mass. 174	497
— v. Old Colony Street Railway, 189 Mass. 594	220, 248	Sherman v. Congregational Home Missionary Society, 176 Mass. 349	149
Rogers v. Barnes, 169 Mass. 179	301	Shindler v. Houston, 1 Comst. 261	269, 506
— v. Ladd, 117 Mass. 334	25	Shrewsbury v. Smith, 12 Cush. 177	125
— v. Ludlow Manuf. Co. 144 Mass. 198	418	Sibbald v. Bethlehem Iron Co. 83 N. Y. 378	586
Rollstone National Bank v. Carleton, 136 Mass. 226	69	Siders v. Siders, 169 Mass. 528	287
Rome v. Worcester, 188 Mass. 307	150	Silva v. Boston Elevated Railway, 183 Mass. 249	65
Rooney v. Randolph, 123 Mass. 580	599	Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co. 97 Mass. 361	346
Rosen v. United States, 161 U. S. 29	468	Skehill v. Abbott, 184 Mass. 145	143
Rosenberg v. West End Street Railway, 168 Mass. 561	66	Slattery v. Lawrence Ice Co. 190 Mass. 79	65
Rothschild v. Knight, 176 Mass. 48	79	Smethurst v. Barton Square Church, 148 Mass. 261	149
— v. —, 184 U. S. 334	79	Smith v. Brennan, 62 Mich. 349	506
Royal Bank of Liverpool v. Grand Junction Railroad, 125 Mass. 490	119	— v. Butler, 176 Mass. 38	532
Russell v. Wellington, 157 Mass. 100	538	— v. Colby, 136 Mass. 592	505
Ryder v. Loomis, 161 Mass. 161	293	— v. Lyke, 13 Hun, 204	568

Smith v. Wildes, 143 Mass. 556	5	Sullivan v. Gilroy, 55 Hun, 285	540
Snell v. Dwight, 121 Mass. 348	35	— v. Kelly, 3 Allen, 148	597
Snow v. Boston Blank Book Manuf. Co. 153 Mass. 456	574	— v. Lowell & Dracut Street Railway, 162 Mass. 536	565
— v. Gould, 74 Maine, 540	804	Sunter v. Sunter, 190 Mass. 449	574
— v. Orleans, 126 Mass. 458	405	Sweetland v. Lynn & Boston Rail- road, 177 Mass. 574	66, 455, 511
— v. Terrett, 167 Mass. 457	522	Sweetser v. Eaton, 14 Allen, 157	207
— v. Warner, 10 Met. 132	505	Sykes v. Dixon, 9 Ad. & El. 693	382
Somerby v. Buntin, 118 Mass. 279	546	Szathmary v. Adams, 166 Mass. 145	444
Somerville v. Fiske, 137 Mass. 91	457		
South Congregational Meeting- house v. Hilton, 11 Gray, 407	185	Tappan v. Boston, 191 Mass. 441	494
Southworth v. Old Colony & New- port Railway, 105 Mass. 342	163	Tashjian v. Worcester Consolidated Street Railway, 177 Mass. 75	517
Spaulding v. Flynt Granite Co. 159 Mass. 587	362	Tasker v. Stanley, 153 Mass. 148	557
Spencer's case, 5 Coke, 16 a	185	Taunton v. Taylor, 116 Mass. 254	875
Spofford v. Harlow, 3 Allen, 176	450	Taylor v. Caldwell, 3 B. & S. 826	423
Spooner v. Old Colony Street Rail- way, 190 Mass. 132	54, 826	— v. Smith, [1898] 2 Q. B. 65	506
Springfield v. Harris, 107 Mass. 532	494	Teal v. St. Paul City Railway, 96 Minn. 379	318
— v. Sleeper, 115 Mass. 587	520	Thayer v. Winchester, 133 Mass. 447	41
Stacey v. Haverhill, Georgetown & Danvers Street Railway, 191 Mass. 326	163	Third National Bank v. Ashworth, 105 Mass. 503	111
Stack v. O'Brien, 157 Mass. 374	206	Thomas v. Boston Elevated Rail- way, 198 Mass. 438	562
Stark v. Boston, 180 Mass. 293	375	— v. Commercial Union As- surance Co. 162 Mass. 29	568
Starkie v. Richmond, 155 Mass. 188	118	— v. Waterman, 7 Met. 227	330
State v. Boston & Maine Railroad, 80 Maine, 430	317	Thompson v. Corby, 27 Beav. 649	553
— v. Delaware & A. Tel. & Tel. Co. 47 Fed. Rep. 633	613	— v. Gould, 20 Pick. 134	424, 485
— v. Dickenson, 44 Fla. 623	411	— v. King, 173 Mass. 439	481
— v. Manchester & Lawrence Railroad, 52 N. H. 528	452	— v. Thompson, 1 Coll. C. C. 881	553
State Treasurer v. Auditor Gen- eral, 46 Mich. 224	194	Thomson v. Manhattan Railway, 75 Hun, 548	347
Stearns v. Stearns, 1 Pick. 157	41	Thornton v. Adams, 11 Gray, 391	302
Steele v. Burkhardt, 104 Mass. 59	450	Thorogood v. Bryan, 8 C. B. 115	312
Steffe v. Old Colony Railroad, 156 Mass. 202	250	Thyng v. Fitchburg Railroad, 156 Mass. 13	91
Stetson v. Kempton, 13 Mass. 272	410	Tilton v. Boston & Albany Rail- road, 169 Mass. 258	313
Stevens v. Boston Elevated Rail- way, 184 Mass. 476	66	Timms v. Old Colony Street Rail- way, 188 Mass. 193	334
— v. Boxford, 10 Allen, 25	5	Tindley v. Salem, 137 Mass. 171	150
Stickney v. Clement, 7 Gray, 170	399	Tioga County v. South Creek Town- ship, 75 Penn. St. 433	597
Stiff v. Ashton, 155 Mass. 130	405	Tisdale v. Bridgewater, 167 Mass. 248	4
Stockett v. Howard. 34 Md. 121	186	— v. Harris, 20 Pick. 9	546
Stone v. Boston & Albany Railroad, 171 Mass. 536	363, 451	Toll v. Merriam, 11 Allen, 895	205, 302
— v. Browning, 51 N. Y. 211	506	Toll Bridge Co. v. Osborn, 35 Conn. 7	195
— v. —, 68 N. Y. 598	500	Tornado, The, 108 U. S. 342	424
— v. Dickinson, 5 Allen, 29	75	Torphy v. Fall River, 188 Mass. 310	4, 512
Stow v. Robinson, 24 Ill. 632	17	Tourtellot v. Phelps, 4 Gray, 370	156
Strauss v. Newburgh Electric Rail- way, 6 App. Div. (N. Y.) 234	318	Townsend v. Hargraves, 118 Mass. 325	505
Streeter v. Worcester, 177 Mass. 29	573	— v. Townsend, 156 Mass. 454	287
Strong v. Dodds, 47 Vt. 348	505	Toy v. United States Cartridge Co. 159 Mass. 313	130
Sullings v. Ginn, 131 Mass. 479	457	Transfer Co. v. Kelly, 36 Ohio St. 86	319
Sullivan v. Boston Elevated Rail- way, 185 Mass. 602	313	Treat v. Boston & Lowell Railroad, 181 Mass. 371	346
— v. —, 192 Mass. 37	65		
— v. Fall River, 144 Mass. 579	538		
— v. Fitchburg Railroad, 161 Mass. 125	497		



Tripp v. Macomber, 187 Mass. 109	236	Waterhouse v. Levine, 182 Mass. 407	36
— v. Smith, 180 Mass. 122	425	Waterman v. Meigs, 4 Cush. 497	505
Troy Cotton & Woollen Manufactory v. Fall River, 187 Mass. 517	195	Watertown v. Mayo, 109 Mass. 315	373
Trull v. Eastman, 8 Met. 121	185	Watkins v. Goodall, 188 Mass. 583	94
Tucker v. Justices of Iredell County, 13 Ired. 434	575	Watson v. Jones, 13 Wall. 679	51
— v. Tucker, 74 Miss. 98	558	Watt v. Watt, [1905] A. C. 115	414
Twomey v. Crowley, 137 Mass. 184	293	Watts v. Watts, 160 Mass. 464	36
Tyndale v. Old Colony Railroad, 156 Mass. 503	77	Way v. Sperry, 6 Cush. 238	330
United Pacific Railroad v. Artist, 60 Fed. Rep. 865	152	Weare v. Chase, 93 Maine, 264	159
— v. Hall, 91 U. S. 843	540	Webber v. Virginia, 103 U. S. 344	611
— v. Lapeley, 51 Fed. Rep. 174	320	Weeks v. Boston Elevated Railway, 190 Mass. 563	326
United Railways v. Biedler, 98 Md. 564	318	— v. Needham, 156 Mass. 289	599
— v. Deane, 98 Md. 619	346	Weichselbaum v. Curlett, 20 Kans. 709	391
United Society v. Winkley, 7 Gray, 460	581	Weinschenk v. New York, New Haven, & Hartford Railroad, 190 Mass. 250	885
United States v. Dewitt, 9 Wall. 41	611	Welch v. Swasey, 193 Mass. 364	476
United States Consolidated Seeded Raisin Co. v. Griffin, 126 Fed. Rep. 864	613	Wellington, petitioner, 16 Pick. 87	478
Urquhart v. Smith & Anthony Co. 192 Mass. 257	4, 419, 512, 517	— v. Belmont, 164 Mass. 142	276
Van Horne v. Crain, 1 Paige, 455	186	Wells v. Calnan, 107 Mass. 514	423
Vannini v. Paine, 1 Har. (Del.) 65	613	West Chicago Street Railroad v. Dougherty, 209 Ill. 241	316
Van Tassel v. Manhattan Eye & Ear Hospital, 15 N. Y. Supp. 620	152	Westgate v. Wixon, 128 Mass. 804	187
Van Vranken v. Clifton Springs, 86 Hun, 67	318	Westlake v. Westlake, 34 Ohio St. 621	558
Vecchioni v. New York Central & Hudson River Railroad, 191 Mass. 9	250	Wheeler v. Grand Trunk Railway, 70 N. H. 607	453
Victor Talking Machine Co. v. The Fair, 123 Fed. Rep. 424	613	Whipple v. Robbins, 97 Mass. 107	79
Vincent v. Norton & Taunton Street Railway, 180 Mass. 104	516	Whitcher v. McLaughlin, 115 Mass. 167	62
Vinton v. Middlesex Railroad, 11 Allen, 304	347	White v. Allen, 183 Mass. 423	18
Vogt v. Hecker, 118 Wis. 306	424	— v. Gove, 183 Mass. 333	479
Volk v. Stowell, 98 Wis. 385	18	— v. Ross, 47 Mich. 172	558
Vormus v. Tennessee Railroad, 97 Ala. 326	816	— v. Webster, 13 Pick. 374	43
Vyryan v. Arthur, 1 B. & C. 410	185	— v. White, 169 Mass. 52	189
Wabash, St. Louis & Pacific Railroad v. Shacklet, 105 Ill. 364	316	— v. Worcester Consolidated Street Railway, 167 Mass. 43	516
Wadsworth v. Boston Elevated Railway, 182 Mass. 572	417, 439	Whiting v. Whiting, 114 Mass. 494	597
Wagner v. Boston Elevated Railway, 188 Mass. 437	419	Whitney v. Wheeler Cotton Mills, 151 Mass. 396	157
Waldron v. Lee, 5 Pick. 323	574	Whittaker v. Helena, 14 Mont. 124	315
Walker v. Whittemore, 13 Wall. 3	347	Wilde v. Lynn & Boston Railroad, 163 Mass. 533	455, 511
— v. —, 112 Mass. 187	391	Willard v. Stone, 18 Gray, 475	529
Walah v. Loorem, 180 Mass. 18	229	Wiley v. Boston & Maine Railroad, 72 Vt. 120	452
Waltham Bank v. Waltham, 10 Met. 334	527	Williams v. Campbell, 8 Met. 209	529
Warburton v. Gourse, 193 Mass. 203	413	— v. Clarke, 182 Mass. 816	62
Warren v. Charlestown, 2 Gray, 84	377	— v. Williams, 20 Col. 51	559
— v. Fitchburg Railroad, 8 Allen, 227	510	Williams College v. Williamstown, 167 Mass. 505	178
— v. Lyons, 152 Mass. 810	69	Williamson v. Louisville Industrial School of Reform, 95 Ky. 251	149
		— v. Old Colony Street Railway, 191 Mass. 144	516
		— v. Taylor, 5 Q. B. 175	382
		Willis v. Sharp, 113 N. Y. 586	81
		Wilson v. Lawrence, 139 Mass. 818	532
		Winckler v. Great Western Railway, 18 U. C. (C. P.) 250	322
		Wolcott v. Smith, 15 Gray, 537	565

Wood v. Corl, 4 Met. 208	592	Worcester Coal Co. v. Utley, 167	
—— v. Massachusetts Mutual Ac-		Mass. 558	437
cident Association, 174 Mass. 217	536	Wright v. Templeton, 132 Mass. 49	5
—— v. Westborough, 140 Mass.		Wyllie v. Cotter, 170 Mass. 366	279
403	574	—— v. Coxe, 15 How. 415	18
—— v. Whitehead Brothers Co.			
165 N. Y. 545	358	Yarnold v. Bowers, 186 Mass. 896	313
Woodruff v. Bowen, 186 Ind. 431	284	Young v. Boston & Maine Railroad,	
Woods v. Carl, 203 U. S. 858	613	168 Mass. 219	91
—— v. Miller, 30 App. Div.		—— v. Chicopee, 186 Mass. 518	423
(N Y.) 232	284	—— v. Providence & Stonington	
—— v. Naumkeag Steam Cotton		Steamship Co. 150 Mass. 550	529
Co. 134 Mass. 357	94	—— v. Small, 188 Mass. 4	65, 565
Worcester v. Boston, 179 Mass. 41	192	—— v. Young, 8 Wash. 181	568



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS.**

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**ROSA B. CUTTING vs. INHABITANTS OF SHELburnE.**  
**EDWARD T. CUTTING vs. SAME.**

Franklin. September 19, 1906. — October 16, 1906.

Present : KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

*Way, Defect in highway. Negligence.*

The absence of suitable railings or barriers at the sides of a bridge over a brook, the bridge being thirty feet long and thirteen and a half feet wide between stringers eight inches high on each side and forming a part of the main highway between two towns, can be found to be a defect in the highway.

In an action against a town for personal injuries and for damage to a horse and buggy from an alleged defect in a highway, if it appears that the plaintiff, while crossing a bridge only thirteen and a half feet wide which he knew well and knew to be without suitable railings, was driving a blind horse, gentle and not in the habit of stumbling, at a slow trot with the reins in his left hand and was using his right hand to tuck in the lap robe, when the horse stumbled and jerked the reins, the plaintiff grabbed the reins with his right hand and in an instant the plaintiff with his horse and buggy went over the side of the bridge into the brook below, it is a question for the jury whether the plaintiff was in the exercise of due care.

TWO ACTIONS OF TORT, the first for personal injuries, and the second for personal injuries and for damage to a horse and buggy, alleged to have been caused by a defect in a public high-

way which the defendant was bound to keep in repair, the alleged defect consisting of the absence of a barrier or railing on a bridge over a brook. Writ dated February 1, 1904.

In the Superior Court the cases were tried together. At the first trial before *De Courcy, J.* the jury returned verdicts for the plaintiffs, which were set aside by the judge. The second trial was before *Aiken, C. J.* It appeared that the accident happened upon the main highway from Colrain to Greenfield, which was extensively travelled, upon a bridge thirty feet long over a brook. The bridge was open to travel thirteen and a half feet wide between the stringers which were laid upon the ends of the planking lengthwise, one upon each side of the bridge. The stringers were eight inches in height or thickness, and the top of the planking was from seven to eight and a half feet above the bed of the brook. There was no railing or safeguard upon the sides of the bridge other than these stringers which lay upon the planking.

The plaintiffs, who were husband and wife, were driving together at the time of the accident, and both testified at the trial describing the accident. There were no other witnesses who saw the accident.

Edward T. Cutting, the plaintiff in the second case, testified that he was a farmer and lived in Colrain on the main road to Greenfield about two miles from the bridge where the accident occurred; that he had travelled the road frequently for the past ten years, once a week and sometimes oftener; that the bridge had no railing during all of that time; that he had travelled over the road some fourteen years; that it is a pretty largely travelled road; that on the morning of October 1, 1903, he left home about a quarter past six with his wife, Rosa B. Cutting; that it was light and he was driving in an open buggy with a single horse; that the horse was about twelve or fourteen years old, weighed eleven hundred pounds and was blind; that he bought the horse about six months before and had driven it during that time as often as every other week to Greenfield, some six miles, over this road, and some of the time as often as two or three times a week, and had driven it elsewhere, and during the time had used it as a general driving horse; that his ten year old son had driven the horse several times and had

driven it to Greenfield; that on the morning of the accident he was seated upon the right hand side of the buggy, driving, with his wife at his left hand; that when he arrived within about one hundred feet of the bridge his whip caught upon the limb of a tree and was pulled out of the socket; that he stopped his horse and got out and picked up the whip and put it into the buggy, and got in again and tucked up the robe and started along; that it was a cold, chilly morning and as he approached the bridge he wanted to tuck the lap robe around his feet; that he then was driving with one hand, and had the reins firmly in that hand; that the horse was then just on the bridge; that the horse was going at a slow trot, something like five or six miles an hour, very nearly in the regular tow path; that he reached down with his right hand to tuck in the lap robe around his feet when he felt a jerk of the reins; that as the horse jerked the reins he grabbed them with the other hand, and that in an instant they were over the side of the bridge, his wife, himself, the horse and the buggy into the brook; that there was no railing upon the bridge where they went off but only a stringer upon the side of the bridge about eight inches high.

Rosa B. Cutting, the plaintiff in the first case, testified in describing the accident "that she saw the horse stumble as it went on to the bridge, but only once; that the horse went on one side a little before her husband jerked on the reins; as the horse stumbled he went one side a little."

At the close of the evidence, the defendant asked the Chief Justice to rule that on all the evidence the plaintiff was not entitled to recover, and that, there being no evidence to show due care on the part of the plaintiff in either case, the verdicts must be for the defendant.

The Chief Justice refused to rule as requested, and submitted the cases to the jury.

The jury found for the plaintiff Rosa B. Cutting in the sum of \$1,620, and for the plaintiff Edward T. Cutting in the sum of \$250; and the defendant alleged exceptions.

*D. Malone*, for the defendant.

*S. D. Conant*, for the plaintiffs.

BRALEY, J. A refusal to rule at the close of the evidence that these actions could not be maintained raises the questions of law

presented by the exceptions. They are, whether the plaintiffs' injuries were caused by want of a sufficient railing upon the bridge which formed part of the highway, thus causing a defect which might have been remedied by reasonable diligence on the part of the defendant, and whether at the time of the accident they were in the exercise of due care.

In speaking of this obligation imposed upon towns, Mr. Justice Ames, in *Marshall v. Ipswich*, 110 Mass. 522, 526, said, "The purpose of such railings is to make the way itself safe and proper for use. They are required in the case of bridges, embankments or causeways, and generally where excavations, deep water, etc., are so near to the line of public travel as to expose travellers to unusual hazards."

It is sufficient to say that upon this question, which was an issue of fact, the jury could find that the highway, originally laid out in 1784 and relocated in 1826, had become defective because of the absence of a sufficient railing, which if erected and maintained would have rendered this part of the road safe and convenient for the use of travellers and prevented the accident. *Lyman v. Amherst*, 107 Mass. 389. *Harris v. Newbury*, 128 Mass. 821. *Tisdale v. Bridgewater*, 167 Mass. 248. *Harris v. Great Barrington*, 169 Mass. 271.

This defective condition was well known to the husband who acted as driver, but neither such knowledge, nor the opportunity for immediate observation which was afforded as the carriage approached the bridge, are conclusive upon the question of contributory negligence. They are to be treated rather as circumstances to be considered by the jury with the other testimony bearing upon this issue. We refer only to a few of the more recent decisions. *Powers v. Boston*, 154 Mass. 60, 68. *McGuinness v. Worcester*, 160 Mass. 272, 273, and cases cited. *St. Germain v. Fall River*, 177 Mass. 550. *Torphy v. Fall River*, 188 Mass. 810. *Campbell v. Boston*, 189 Mass. 7, 10. *Hennessey v. Taylor*, 189 Mass. 583, 586. See also *Urquhart v. Smith & Anthony Co.* 192 Mass. 257.

The further important fact that the horse was blind also comes within this division, for how far loss of sight may have rendered him unmanageable, or contributed to the accident, depended largely upon the weight to be given to the evidence, when viewed

in the light of common experience, that notwithstanding this infirmity he could be used and driven with safety. *Brackenridge v. Fitchburg*, 145 Mass. 160. *Smith v. Wildes*, 148 Mass. 556.

If the inference either of care or of negligence which might have been drawn from this portion of the evidence was solely for the jury, nothing further remains upon which the defendant's argument can rest, except the conduct of the driver in the management of the horse. The degree of care and skill with which a horse is being driven, or which may be required under certain conditions, generally is a question peculiarly within the province of the jury to decide. *Stevens v. Boxford*, 10 Allen, 25, 26. *Blood v. Tyngsborough*, 103 Mass. 509. *Hill v. Seekonk*, 119 Mass. 85. *Bly v. Haverhill*, 110 Mass. 520.

To drive in the daytime, with the reins in one hand, at a slow trot, a blind horse which could have been found to have been gentle and unaccustomed to stumble, even if the way led over a narrow bridge without suitable railings, required only that degree of care which the ordinarily careful man would exercise if placed in an analogous situation. Undoubtedly, as the event proved, it would have been more prudent to have guided the horse by holding the reins in both hands, and to have given exclusive attention to keeping him in the centre of the bridge, instead of driving with one hand and using the other to adjust the carriage robe, with the consequent interruption of the driver's attention to the exact course of travel; yet such conduct cannot be said as matter of law to be so extraordinary as not to be fairly incidental to the ordinary use of our public ways by travellers. *Wright v. Templeton*, 182 Mass. 49. *Kelly v. Blackstone*, 147 Mass. 448, 451. *Britton v. Cummington*, 107 Mass. 847.

It accordingly follows that the rulings requested were rightly refused, and the cases were properly submitted to the jury.

*Exceptions overruled.*



HUGH McLEOD vs. SOUTH DEERFIELD WATER SUPPLY DISTRICT.

CHARLES S. SHATTUOK vs. SAME.

SETH W. KINGSLEY vs. SAME.

Franklin. September 18, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

*Water Supply. South Deerfield Water Supply Company. Statute, Construction. Practice, Civil, Exceptions.*

By St. 1902, c. 486, which established the South Deerfield Water Supply District, the South Deerfield Water Supply Company was authorized to "take by purchase or otherwise and hold the waters of Roaring Brook and of any or all of its tributaries in the towns of Deerfield and Whately, except that part of said brook and tributaries which lies west of and above the main road leading from Conway village to West Whately; and the waters of any springs or other sources on the watershed of said brook, with the water rights connected therewith, except that part which lies west of and above the main road leading from Conway village to West Whately." By the same statute the company was authorized to take lands and easements in the towns of Deerfield and Whately and construct thereon the dams and other structures and lay and maintain the aqueducts necessary for providing and maintaining complete and effective water works. The watershed of Roaring Brook east of the road mentioned in the statute was largely outside of the towns of Deerfield and Whately. The company took in the manner provided by the statute all the waters of Roaring Brook and its tributaries east of the road mentioned in the statute which it was authorized to take by the statute, and afterwards refused to pay damages for the taking of waters in the town of Hatfield on the ground that it had the right to take only that part of the waters of Roaring Brook and its tributaries lying within the towns of Deerfield and Whately. *Held*, on a petition for the damages thus refused, that the company was authorized to take all the waters of Roaring Brook and its tributaries east of the road mentioned in the statute outside the towns of Deerfield and Whately as well as within them, although the authority to take lands and easements for the construction of such dams, reservoirs and other works as might be necessary was confined to the towns of Deerfield and Whately.

Exceptions not argued are treated as waived.

THREE PETITIONS, the first two filed on September 28, 1904, and the third filed on October 26, 1904, for the assessment of damages sustained by the petitioners to their lands in Hatfield by the taking of water by the respondent under the provisions of St. 1902, c. 486.

In the Superior Court the cases were heard by *Pierce, J.* The petitioners severally owned rights to the use of water power upon Mill River in Hatfield, and the respondent took by virtue of the statute such water as under the statute and a certificate filed by it in the registry of deeds it was entitled to take. The provisions of the statute are printed on page 8. The description in the certificate of taking was as follows: "as authorized by said act, all the waters of Roaring Brook and its tributaries as aforesaid above the point of taking, which is the point on said Roaring Brook where the dam is now being constructed, and extending from that point up said brook to the west side of the main road leading from Conway village to West Whately." It appeared that in the watershed of Roaring Brook above the dam of the respondent there were four and eighty-eight one hundredths square miles of land, of which three and seventy-four one hundredths square miles lay east of and below the main road leading from Conway to West Whately, but that only one square mile thereof lay in the towns of Deerfield and Whately. The respondent asked the judge to rule that the petitioners could recover damages only for water taken by it in the towns of Deerfield and Whately.

The judge refused to rule as requested, and instructed the jury that under the statute and the certificate of taking the respondent had the right to take and had taken all the waters of Roaring Brook easterly of the road mentioned from Conway to West Whately, whether the waters were in the town of Deerfield and Whately or not, and that the petitioners could recover damages from the respondent for the taking of the water from three and seventy-four one hundredths square miles of land, whether it lay in the towns of Deerfield and Whately or elsewhere, provided that such land was easterly of the road from Conway to West Whately.

The jury returned verdicts for the petitioners in each case, in the case of McLeod in the sum of \$1,200, in the case of Shattuck in the sum of \$1,200, and in the case of Kingsley in the sum of \$250. The respondent alleged exceptions to the refusal of the request for the ruling stated above, and also to the refusal of other requests for rulings which have become immate-

rial because they were not argued by the respondent and were treated by the court as waived.

St. 1902, c. 486, is entitled "An Act to provide for supplying the village of South Deerfield with water, and for establishing the South Deerfield Water Supply District."

The first two sections of the statute, omitting the boundaries of the district, are as follows :

"Section 1. The inhabitants of the village of South Deerfield in the county of Franklin, liable to taxation in the town of Deerfield and residing within the territory enclosed by the following boundary lines, to wit: . . . [Boundaries] . . . shall constitute a water district, and are hereby made a body corporate, by the name of the South Deerfield Water Supply District, for the purpose of supplying themselves with water for the extinguishment of fires and for domestic and other purposes, with power to establish fountains and hydrants and to relocate or discontinue the same, to regulate the use of such water and to fix and collect rates to be paid for the use of the same, and to take by purchase or otherwise and hold property, lands, rights of way and easements, for the purposes mentioned in this act, and to prosecute and defend in all actions relating to the property and affairs of the district.

"Section 2. Said water supply district, for the purpose aforesaid, may take by purchase or otherwise and hold the waters of Roaring Brook and of any or all of its tributaries in the towns of Deerfield and Whately, except that part of said brook and its tributaries which lies west of and above the main road leading from Conway village to West Whately; and the waters of any springs or other sources on the watershed of said brook, with the water rights connected therewith, except that part which lies west of and above the main road leading from Conway village to West Whately: provided, that no source of water supply for domestic purposes shall be taken under this act without the consent of the State board of health, and that the location of all dams and reservoirs shall be subject to the approval of said board. Said district may also take by purchase or otherwise and hold all lands, rights of way and easements in the towns of Deerfield and Whately necessary for taking, holding, storing and improving such water and for conveying the same to and

through said South Deerfield Water Supply District, and said district may construct on the lands thus taken or acquired proper dams, buildings, fixtures and other structures, and may do such other things as may be necessary for providing and maintaining complete and effective water works; and for that purpose may construct, lay and maintain aqueducts, conduits, pipes and other works, under or over any land, watercourses, railroads, railways and public or other ways, and along any highway or other way in the towns of Deerfield and Whately, in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, laying, maintaining and repairing such aqueducts, conduits, pipes and other works, and for all other purposes of this act, said water supply district may dig up, raise and embank any such lands, highways or other ways, in such manner as to cause the least hindrance to public travel; but all things done upon any such ways shall be subject to the direction of the selectmen of the town in which such way is situated."

*F. L. Greene, (W. A. Davenport with him,) for the respondent.*

*A. E. Addis, (D. Malone with him,) for the petitioners.*

SHELDON, J. By the second section of c. 486 of the St. of 1902 the respondent was authorized to "take by purchase or otherwise and hold the waters of Roaring Brook and of any or all of its tributaries in the towns of Deerfield and Whately, except that part of said brook and its tributaries which lies west of and above the main road leading from Conway village to West Whately; and the waters of any springs or other sources on the watershed of said brook, with the water rights connected therewith, except that part which lies west of and above the main road leading from Conway village to West Whately." The respondent has made a taking under this statute, and in its certificate filed under § 8 of the statute has described the waters taken as "all the waters of Roaring Brook and its tributaries" above a dam and reservoir constructed by the respondent in the town of Whately, "and extending from that point up said brook to the west side of the main road" aforesaid. It now contends, as it asked the judge at the trial to rule, that under the statute quoted it had the right to take only that part of the waters of Roaring Brook and its tributaries which lies in

the towns of Deerfield and Whately, and that no damage can be assessed in these proceedings for the taking of any other water. But if this construction were adopted, it would lead to the absurd conclusion that while the respondent's right to take the waters of Roaring Brook and its tributaries was thus limited, yet it was given the express right to take all the sources of water and water rights on the whole watershed of the brook except the part lying west of and above the main road mentioned, including of course that part of such watershed which is situated in the town of Conway as well as in Deerfield and Whately; that is, the respondent would not have the right to take any of the waters of the brook in Conway, but could take such waters in that part of Conway which lies east of the main road mentioned while they were merely on the watershed of the brook and before they actually had entered the channel of the brook and become a part of its waters. Such a construction as this could not be adopted unless imperatively required by the words of the statute; and in this case it is made impossible by the fact that in the residue of the section the authority given to the respondent to take the lands and easements and construct the dams and other structures and lay and maintain the aqueducts necessary to provide and maintain complete and effective waterworks is limited to the towns of Deerfield and Whately. The right given in terms to make a taking in the watershed ought not to be taken away or made nugatory by a merely verbal construction. We are of opinion accordingly that by the proper construction of this statute the respondent was authorized to take, as it has taken, all the waters of Roaring Brook and its tributaries except that part thereof lying west of and above the main road already mentioned, and all the sources and water rights on the watershed of said brook, with the same exception; but that the actual taking of the water, the construction of such dams, reservoirs, and other works as might be necessary, should be made only in the towns of Deerfield and Whately. By this construction effect is given to all the words of the statute; and we agree with the respondent that this should be done.

Accordingly the respondent's request for a ruling in accordance with its contention already stated was rightly refused, and the instruction given as to this question was correct.

The other exceptions taken at the trial were not argued, and we treat them as waived.

*Exceptions overruled.*

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JEROME D. MILLS vs. WILLIAM H. SMITH, executor.

Hampshire. September 18, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

*Practice, Civil, Exceptions. Agency, Termination. Contract, Consideration, Validity, Performance and breach. Perpetuities. Executor and Administrator. Damages. Fraud, Who can take advantage of. Res Inter Alios.*

A party to an action of contract cannot at the argument of exceptions taken by him complain of a ruling as to what instruments constituted the contract between the parties which was made by the judge at his request.

A power of attorney to convey real estate which is not coupled with an interest in the real estate is terminated by the death of the constituent. Here it was conceded that a right to be paid a compensation from the proceeds of the sale of the real estate was not such an interest.

In an action to enforce a promise contained in an instrument under seal reciting the receipt of a valuable consideration the defence of a want of mutuality is not open.

In a contract between the owner of lands in a distant State, the title to some of which is incumbered, to pay for the services of a citizen of that State in clearing the title to the lands and disposing of them, there is no lack of mutuality by reason of a provision in the contract that the person who is to perform the services agrees to give to the transaction of the business "as much of his time as to him may seem necessary" in order to manage the business properly and to "use his best judgment" in the disposition of the property and the settlement of all matters in dispute in regard to it.

In a contract between the owner of lands in a distant State, the title to some of which is incumbered, to pay for the services of a citizen of that State in clearing the title to the lands and disposing of them, which expressly provides that in case of the death of the landowner before the contract is completed the executor of his will shall be required to carry it out, there is nothing contrary to the rule against perpetuities, because the contract being one to pay for personal services must terminate at the death of the person employed if not completed earlier.

A contract between the owner of lands in a distant State, the title to some of which is incumbered, to pay for the services of a citizen of that State in clearing the title to the lands and disposing of them, which expressly provides that in case of the death of the landowner before the contract is completed the executor of his will shall be required to carry it out, is not invalid on the ground that it unreasonably and unlawfully interferes with the settlement of the landowner's estate, it being within the power of a testator to provide for a disposition or use of his property after his death which will prevent the final settlement of his estate for a long time.

If the owner of lands in a distant State, the title to some of which is incumbered, enters into a contract under seal with a citizen of that State to pay him for his

services in clearing the title to the lands and disposing of them, which expressly provides that in case of the death of the landowner before the contract is completed the executor of his will shall be required to carry it out, and the landowner upon executing the instrument further agrees by letter to execute a codicil to his will directing his executor to carry out the provisions of the contract or to have his executor follow his instructions to that effect, and if, before the services of the person employed under the contract are completed, the landowner dies without making such a codicil and the executor of his will and the beneficiaries thereunder refuse to permit the completion of the contract and assert a right to have the estate of the testator administered as if the contract had not been made, these acts constitute a breach of the contract for which the executor is liable in an action for damages.

In an action against an executor for damages for breach of a contract in writing, it appeared that by the contract sued upon the plaintiff agreed to take charge of the real estate belonging to the defendant's testator in a distant State in regard to some of which litigation was pending and to clear the title to the real estate, and the defendant's testator authorized the plaintiff to sell the real estate and after paying expenses to divide the net proceeds equally between the plaintiff and the defendant's testator, that the title to a part of the real estate had been held in the name of a brother in law of the defendant's testator, who having become involved in financial difficulties reconveyed it to the defendant's testator, that a judgment for over \$13,000 had been obtained against the brother in law by one of his creditors, and a suit in equity had been brought upon this judgment to set aside the reconveyance, that the plaintiff was the administrator of the estate of the brother in law, that the plaintiff acting under the contract made a settlement of the suit by which he secured a release of the claim upon the real estate and an assignment of the judgment to the defendant's testator, that to obtain this he conveyed to the holder of the judgment lands of the defendant's testator worth about \$5,000, that the judgment turned out to be worth over \$12,000 as a claim against the insolvent estate of the brother in law, and that the defendant as executor collected that amount from the insolvent estate. The defendant contended that the amount of this judgment could not be included as a part of the property of his testator in the distant State in computing the damages which the plaintiff was entitled to recover. It appeared that the plaintiff in the transaction acted in good faith under the contract in the interest of the defendant's testator in perfecting his title to the lands. *Held*, that the judgment was a part of the proceeds of the lands of the defendant's testator within the meaning of the contract; that, even if there was constructive fraud on the part of the plaintiff as administrator of the estate of the brother in law in procuring the assignment of the judgment in which he had a pecuniary interest, this was *res inter alios* as to the defendant, who moreover had ratified the transaction by collecting the money on the judgment.

No exception lies to the refusal of a request for a ruling which although correct as an abstract proposition of law is immaterial and the refusal of which has not injured the excepting party.

CONTRACT by Jerome D. Mills, a citizen of the State of Minnesota, against William H. Smith of South Hadley, executor of the will of Samuel Mills Cook, late of Granby, for compensation for services performed under a contract in writing under seal dated December 29, 1900, the material portions of

which are quoted or described in the opinion, and for damages for an alleged breach of the same contract. Writ dated January 5, 1904.

In the Superior Court the case was tried before *Stevens, J.*, without a jury. He found for the plaintiff in the sum of \$16,501.68; and the defendant alleged exceptions, raising the questions which are stated in the opinion.

*S. C. Darling*, (*N. P. Avery* with him,) for the defendant.

*H. P. Roberts* (of Minnesota) & *S. W. Packard* (of Illinois), (*E. L. Shaw* with them,) for the plaintiff.

**KNOWLTON, C. J.** The plaintiff's claim rests upon a contract under seal, entered into between him and the defendant's testator. The recovery now sought is of damages for a breach of contract. In making the writing the parties first recited that Samuel M. Cook, the defendant's testator, then a resident of Holyoke, Massachusetts, was the owner of a large amount of real estate and some personal property in the State of Minnesota; that there was litigation pending in regard to the title to some of the real estate; that there were unpaid taxes upon much of it; that Cook was unwilling to spend any more money in caring for his property interests in Minnesota and did not wish to be troubled about deciding questions of policy in the management of his interests in that State; that he had confidence in the judgment and business ability of the plaintiff and was desirous of inducing him to take charge of his business affairs in the State of Minnesota, and that he had already executed a general power of attorney authorizing him to make conveyances and to do other business for Cook in that State. The contract, which bore date December 29, 1900, continued as follows: "Witnesseth, that the said party of the first part, for and in consideration of the promises and agreements made by the party of the second part hereinafter contained, and in further consideration of the sum of one dollar in hand paid by the said Mills to the said Cook, has agreed and hereby does agree to and with the said Mills, as follows, to wit:

"The said Cook hereby authorizes and directs the said Mills to take entire charge of all the property interests of the said Cook in the State of Minnesota, of every kind and nature, whether the same be in the shape of real property or in the



shape of liens or claims upon real property of any kind or nature, and hereby authorizes the said Mills to sell and dispose of any and all his interests in Minnesota at such prices and upon such terms as may seem best to him, the said Mills; and does hereby authorize the said Mills to make any disposition of any or all of the said Minnesota property belonging to said Cook as to him may seem best, either to sell the same for cash, or to exchange the same for other property or do anything in the premises that may seem wise and prudent to the said Mills.

"It is further understood and agreed that out of the proceeds of the said property, so to be sold by the said Mills, there shall first be paid any and all expenses and disbursements incurred by the said Mills in the transaction of the said business; after the payment of the said costs and expenses the net proceeds obtained from the said property are to be divided equally between the parties to this agreement. The said Mills agrees to accept his half of the said proceeds in full settlement of all his claims for compensation for service rendered under this agreement; the said Mills also promises and agrees to give to the transaction of the business hereinbefore set forth, as much of his time as to him may seem necessary in order to properly manage the said business, and use his best judgment in the disposition of the said property and in the settlement of all matters now in dispute in relation to the same, and in the compromise and settlement of all questions that may hereafter arise in regard to the said property.

"It is further understood that the said Mills is to look to the said property for his compensation for all services rendered under this contract, and for all expenses incurred by him in the transaction of the said business.

"It is further understood and agreed that the said Cook relies entirely upon the judgment of the said Mills in the handling of said property, and the said Mills is not to be held accountable to the said Cook or to any one else in his behalf for errors in judgment in the transaction of said business, it being understood that the decision of the said Mills as to the advisability of any particular transaction in the premises shall be absolutely final and binding upon the said Cook.

"It is further understood and agreed that, in the event of the

decease of the said Cook before all of the property interests in Minnesota have been disposed of under this agreement, then and in that case the executors of the will of the said Cook shall be required to carry out the provisions of this contract and co-operate with the said Mills in the disposition of the property covered by this contract, and execute any and all papers of every kind and nature necessary in order to enable the said Mills to dispose of the property in accordance with the terms of this agreement.

"It is further understood and agreed that this contract is binding upon the heirs, executors, administrators and assigns of the respective parties hereto.

"In testimony whereof the said parties have hereunto set their names and affixed their seals the day herein first above mentioned." (Signed and sealed, etc.)

The case was referred to an auditor, who found for the plaintiff, and his report was the principal part of the evidence at the trial before the judge of the Superior Court who heard the case without a jury. Cook, the defendant's testator, died on December 2, 1901. He had signed the contract on January 19, 1901. When it was sent to him for his signature by the plaintiff, who had executed it previously, a proposed codicil to Cook's will was enclosed with it, which directed his executors to carry out all the provisions of the contract, and to that end to execute, at the plaintiff's request, any and all papers relating to any property owned by the testator at the time of his decease, in the State of Minnesota, tending to carry out the provisions of the contract. In a letter sent on the day when he signed the contract, the testator wrote to the plaintiff in part as follows: "Of course I leave the whole thing in your hands and to your judgment, and shall be content with the outcome. The agreement you forward I will sign and shortly forward, and a codicil as you suggest shall be annexed to the will, or my executor, who is my nephew and will scrupulously comply with any instructions I may give, will in good faith carry them out." The following memorandum in Cook's handwriting was found with his will, having been placed there by his direction: "Holyoke, 1, 28th, 1901. This is to certify that the agreement entered into between J. D. Mills of St. Cloud, Minn., and myself for the disposal of all my real estate

in Minnesota I wish my executor Wm. H. Smith to carry out to the letter. S. M. Cook."

Cook died, however, without making any provision by will or codicil for carrying out the agreement after his death, and his executor and the beneficiaries under his will have declined to permit the plaintiff to complete his contract, although he was ready and willing to complete it. At the time of Cook's death the plaintiff had done the greater part of the work required to be done in clearing up the titles to the several parcels of real estate. He had sold lands and personal property, and had expended considerable sums in litigation, and in other ways contemplated by the contract, and had remitted to Cook \$1,100 in money. There remained to be sold, under the contract, lands to which there was a clear title, worth in excess of taxes due thereon, \$18,951.08, and other lands and interests in lands of the agreed value of \$1,000. Nearly \$500 was realized from insurance and from a small piece of land sold after Cook's death.

The questions argued by the defendant arise upon the refusal of the judge to make a large number of rulings requested by him. These relate, for the most part, to the validity of the contract. The first ruling requested by the defendant was made by the judge, to the effect that the contract by which the rights of the parties are to be determined is made up of a sealed instrument bearing date December 29, 1900, the quoted extract from the letter of Cook to Mills dated January 28, 1901, and the statement in Cook's handwriting found with the will. The defendant cannot now complain of a construction of the evidence adopted at his request. Indeed, if, as he now contends, the only contract is the instrument under seal, the legal effect is the same.

It was admitted by both parties, at the hearing before the auditor and at the argument in this court, that the contract did not give the plaintiff a power coupled with an interest, such that he could dispose of the property, or enforce the contract directly against the property, after Cook's death. The plaintiff's authority under the power of attorney was, therefore, terminated by the death of the testator. See *Hunt v. Rousmanier*, 8 Wheat. 174, 208; *Alworth v. Seymour*, 42 Minn. 526.

It is contended that the contract, so far as it is executory, is

non-enforceable because lacking in mutuality. We see no foundation for this contention. In the first place it is an instrument under seal, and it recites the receipt of a valuable consideration by Cook from the plaintiff. Next it purports to give valuable privileges to the plaintiff in the right to receive one half of the proceeds of the property above the expenses of clearing up and establishing the title and other expenses and disbursements in the transaction of the business, and it secures a valuable right to the testator in the agreement of the plaintiff to give his time to the transaction of the business, as much as to him may seem necessary for the proper management of it, and to use his best judgment in the disposition of the property, and in the settlement of all matters relating to it. By this agreement the plaintiff was bound to go on in good faith and exercise his best judgment in the disposition of the property. The case presents no question involving a determination of the relative value of the benefits which each party was to receive under the contract. There was complete mutuality between the parties. *Durkee v. Gunn*, 41 Kans. 496. *Stow v. Robinson*, 24 Ill. 582, 585.

The defendant argues that the contract, including the proposed codicil, was in violation of the law as to perpetuities. But the contract did not authorize any holding of the property or any restraint upon the alienation of it for a term extending beyond a life or lives in being and twenty-one years thereafter. Plainly this is one of that class of contracts in which reliance is placed upon the personal judgment and ability of him who is principally to act under it. *Brown v. Cushman*, 178 Mass. 868, 871. *Marvel v. Phillips*, 162 Mass. 899. *Stow v. Robinson*, 24 Ill. 582. *Janin v. Browne*, 59 Cal. 87. The right to dispose of the property would necessarily end with Mills's death, if it had not previously ended. He was bound to proceed under the contract within a reasonable time, in the exercise of his best judgment. Under this arrangement the property, presumably, would not be withheld from alienation for many years. He could not delegate his authority to another person, to be exercised after his death; nor could he make a contract with another person concerning the land which would be void under the rule against perpetuities. His authority was only to make legal contracts. For these reasons, apart from other consid-

erations urged in argument, the contract is not objectionable in this particular.

The contention that it unreasonably and unlawfully interferes with the settlement of the testator's estate is met in part by what we have just said. It is in the power of a testator to provide for a disposition or use of his property, after his death, which will prevent for a long time the final settlement of his estate. Thus he may direct that it be retained for a term of years in the business of a partnership. *Mason v. Pomeroy*, 151 Mass. 164. *Willis v. Sharp*, 118 N. Y. 586, 589, 590. *Packard v. Kingman*, 109 Mich. 497, 506. *Ferry v. Laible*, 4 Stew. (N. J.) 566. *Burwell v. Cawood*, 2 How. 560, 576. *Ferris v. Van Ingen*, 110 Ga. 102, 108. This objection to the contract is not well taken.

The defendant insists that there was no breach of the contract. It is plain that, by the terms of the writing, it was to continue in force after the death of the testator, and the codicil was to be executed to insure to the plaintiff the right to complete the disposition of the property and to have the benefits to which he was entitled. Even without such an express provision the contract probably would be held to survive the death of the testator. *Grapel v. Hodges*, 112 N. Y. 419. *Janin v. Browne*, 59 Cal. 87. *McCann v. Pennie*, 100 Cal. 547. *Volk v. Stowell*, 98 Wis. 885, 892, 898. *White v. Allen*, 133 Mass. 423. *Drummond v. Crane*, 159 Mass. 577. The neglect of the testator to make such a codicil, and the assertion by the defendant and the beneficiaries under the will of their right to have this part of the estate administered as if the contract had not been made, were a breach of the contract, which subjects the defendant as executor to an action for damages. *Hawley v. Smith*, 45 Ind. 183, 211. *Drummond v. Crane*, 159 Mass. 577. *Newton v. Newton*, 46 Minn. 33. *Wylie v. Coze*, 15 How. 415. *Chamberlain v. Dunlop*, 126 N. Y. 45. Page on Wills, §§ 76, 78.

Previously to the making of the contract, the management of Cook's business in Minnesota had been in the hands of his brother in law, one Bridgman, and the title to many of the lots had been in the name of Bridgman. To protect Cook, Bridgman, in 1893, deeded to him the real estate that previously had been held in Bridgman's name. Later, Bridgman became in-

volved in financial difficulties, and a judgment for \$18,604.45 was recovered against him by one Kells. Suits in equity were subsequently brought against Bridgman and Cook in different counties, upon this judgment, to set aside the conveyance of land from Bridgman to Cook, and notices of *lis pendens* were filed in several counties. Afterwards the present plaintiff, acting under the contract, made a settlement of these suits, by which he secured a release of the claim upon the lands and an assignment of the judgment to Cook. To obtain this he conveyed to the holder of the judgment a part of Cook's lands, worth about \$5,000. At the time of making this arrangement to clear up the title, he supposed that there was but little property in the estate of Bridgman, who was then dead; but it subsequently turned out that the judgment was worth \$12,200 as a claim against the insolvent estate of Bridgman. The facts pertaining to the transaction were communicated to Cook in his lifetime, he received the assignment of the judgment, and the defendant, as his executor, has taken measures to collect from Bridgman's estate the amount due under it. The plaintiff was administrator of this estate at the time of receiving the assignment for Cook. The defendant contends that the value of this judgment cannot be included as a part of the proceeds of Cook's property, for the purpose of determining the damages suffered by the plaintiff.

This judgment was obtained by a transfer of a part of Cook's land in Minnesota. It was a judgment which properly was payable out of Bridgman's estate. Even if it is viewed merely as an incumbrance on Cook's property which it was the duty of Bridgman's administrator to remove, when it was removed by Cook, for the protection of his property, he would be subrogated to the rights of the holder of the judgment against Bridgman's estate. The plaintiff, apparently acting in good faith in the interest of Cook under the contract, perfected for him the title to his lands, and obtained this judgment by giving for it lands worth \$5,000. The judgment was a part of the proceeds of the lands within the meaning of the contract.

There is no suggestion of any fraud as between the plaintiff and the former holder of the judgment which would render the transaction voidable in favor of this holder. If, as between the

plaintiff and the estate of Bridgman, there was constructive fraud founded on the fact that the plaintiff was administrator of Bridgman's estate and was interested in the money that might be obtained upon the judgment, there was no attempt to avoid the transaction on that ground, and the defendant, who has ratified it, cannot take advantage of the fraud in this action. *Lufkin v. Jakeman*, 188 Mass. 528, 582. It is at least doubtful whether, upon the facts shown, anybody can legally object to the transaction. The plaintiff, as administrator of Bridgman, merely permitted a judgment against his intestate to be assigned to the purchaser of it. It is true that he acted as the agent of the purchaser in making the purchase, but there is nothing to show that he had reason to think the transaction in any way detrimental to Bridgman's estate, or directly beneficial to himself. It is true that he had a contract with the purchaser by which he had an interest in the money that might be collected on the judgment, but in this transaction he was acting primarily and directly for Cook alone. The judgment ought legally to be paid in full by the estate, and so far as appears, no facts were known to him that made it a breach of his official duty to participate in a transfer of it from one person to another, even when, through a contract with the purchaser, he would have an interest in the proceeds of it. In view of the facts that the transaction was ratified by the defendant, and that the alleged fraud was *res inter alios*, we need not further consider this defence, even if there was ground for complaint by Bridgman's creditors or next of kin.

It is to be noticed that the recovery was of damages for the breach of the contract, not of any specific sums to which the plaintiff was entitled under the contract. Some of the requests for rulings were inapplicable on this account. In the view which we have taken of the contract and the evidence, most of the requests were rightly refused. Others, which are correct as abstract propositions of law, are immaterial, and the defendant was not injured by the refusal of them.

*Exceptions overruled.*

## FRED P. SQUIER vs. VINCENT E. BARNES.

Hampden. September 25, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, &amp; BRALEY, JJ.

*Practice, Civil, Exceptions, Default, Set-off, Judicial notice. Set-off, Supreme Judicial Court. Witness, Cross-examination.*

This court has no jurisdiction to allow an amendment to a bill of exceptions.

If when a bill of exceptions is before this court one of the parties desires to amend it, his proper course is to ask this court to strike the case from the docket and remit it to the court in which the exceptions were allowed, to enable him to move for the allowance of the amendment there.

If the defendant in an action of contract has filed a declaration in set-off and has been defaulted, he cannot at a hearing for the assessment of the plaintiff's damages introduce evidence in support of his declaration in set-off, having lost by his default the right to prosecute it.

The denial of a motion to take off a default is within the discretion of the presiding judge and is not the subject of exception.

It is within the discretion of a presiding judge reasonably to limit the cross-examination of a witness.

Where in an action of contract for compensation for professional services the defendant has cross-examined the plaintiff from about noon until four o'clock, asking many questions which were excluded, it is reasonable for the presiding judge to notify the defendant that he must close his cross-examination by half past four o'clock, there being nothing to show that there is any evidence which the defendant reasonably can expect to elicit by a further cross-examination of the witness.

An exception to the exclusion of papers offered in evidence cannot be sustained unless the bill of exceptions shows that the papers excluded contained material evidence.

The courts take judicial notice of the statutes contained in the Revised Laws and a refusal to admit such statutes in evidence is not a ground of exception.

CONTRACT on an account annexed by an attorney at law for compensation for professional services and for money expended by him for the defendant. Writ dated May 9, 1904.

The defendant filed an answer, and also a declaration in set-off. In the Superior Court in June, 1905, the defendant was defaulted, and in October, 1905, the case came on for the assessment of damages before *Hitchcock, J.* Upon the motion of the defendant damages were assessed by a jury. The jury assessed damages in the sum of \$146.70. It did not appear that any



order was made as to the disposition of the declaration in set-off.

The defendant filed a bill of exceptions within the time allowed by law, and later filed an amended bill containing new matter. The amended bill was not filed within twenty days of the trial, and the new matter was disallowed by the judge on the ground that it was filed too late.

Later the defendant filed a petition to prove the truth of the portion of the exceptions disallowed by the judge, and filed in this court a motion to amend his bill of exceptions.

The portions of the bill of exceptions stated in the proposed amendment which relate to the matters referred to in the opinion are as follows:

"2. This was a hearing on the assessment of damages in an action of contract before *Hitchcock*, J. and a jury. The plaintiff is an attorney at law and brought this action to recover for his services and expenses as the defendant's attorney in an action of the defendant, Vincent E. Barnes, against Jennie A. Norton, administratrix of the estate of Hiram R. Norton, deceased, which action was brought in the District Court of Western Hampden. After an appeal had been taken by the defendant to, and the case was still pending in, the Superior Court, the plaintiff Fred P. Squier disappeared from the case after he had sent written notice to the defendant Barnes that he would do so. This action also was brought to recover for services on a petition filed in the Supreme Judicial Court for a writ of certiorari."

"6. . . . The defendant called the plaintiff Fred P. Squier to the stand and offered evidence to prove the defendant's declaration in set-off. This was excluded by the judge and the defendant excepted. [The defendant's motion to amend asked to insert a statement of the evidence offered.]

"7. The defendant in his answer in this action alleges fraud and deceit on the part of the plaintiff, Squier. One of the items charged in the plaintiff's account annexed was for drawing a petition for a writ of certiorari asking for a trial before some judge other than Judge Willis Kellogg, judge of the District Court of Western Hampden, in which court the case of Vincent E. Barnes *vs.* Jennie A. Norton, adm'x, was pending, and in which case the plaintiff Squier was attorney for the defendant

Barnes. The defendant introduced testimony to prove that the plaintiff Squier first drew up a petition which was signed and sworn to by the defendant Barnes. The defendant Barnes testified and was not contradicted, that when he read this petition immediately after signing and taking oath to it, he found it petitioned, not for a trial before a different judge, but for a speedy trial before Judge Kellogg. At the defendant's request this part of the petition was removed before filing and another substituted. The defendant offered in evidence the part removed to prove that the plaintiff Squier acted in bad faith as the attorney of the defendant Barnes. This was excluded by the judge and the defendant excepted.

"8. The plaintiff Squier began to testify as the defendant's witness about 12 noon October 24, and was cross-examined by the defendant personally, and was asked many questions which were excluded by the judge. About 4 P. M. the judge stated to the defendant that the cross-examination of the plaintiff by the defendant must be finished by 4.30 P. M., at which time the court adjourned for the day. At the opening of the trial on the morning of October 25, the defendant asked to have the plaintiff take the stand for further examination by the defendant. This the judge refused to allow and the defendant excepted.

"9. The plaintiff in his account annexed charged for the drawing of the papers for the plaintiff in the case of Barnes v. Norton, adm'x. Testimony was introduced to show that the plaintiff Squier drew all the plaintiff's papers in the case of Barnes v. Norton, adm'x, except the account annexed, while said case was pending in the District Court of Western Hampden. The defendant Barnes offered the papers in the case of Barnes v. Norton, adm'x, to prove that these pleadings showed on their face that the statutes should have been set up, in behalf of the plaintiff Barnes by his attorney, the plaintiff Squier, as a defence to the set-off of the defendant Norton, adm'x, and that the statutes were not pleaded. These papers were excluded and the defendant excepted. [The defendant's motion to amend asked to annex copies of these papers.]

"The defendant offered the laws as provided in the Revised Laws to prove such defence should have been set up and that the plaintiff Squier had acted deceitfully and negligently and to the

injury of his client the defendant Barnes. The judge excluded them and the defendant excepted." [The defendant's motion to amend asked to insert copies of R. L. c. 173, § 6, cl. 10, § 27.]

*V. E. Barnes, pro se.*

*R. J. Talbot, for the plaintiff.*

KNOWLTON, C. J. This is a petition to prove exceptions. The petitioner first filed a bill of exceptions, within the time prescribed by the statute. He then filed an amended bill as a substitute for the first, and the presiding judge allowed this bill, with three changes, first, an interlineation, by way of amendment, which stated clearly and correctly the facts referred to in the clause in which the interlineation was made, and secondly, a cancellation of two paragraphs, on the ground that the exceptions stated in them were not contained in the original bill, and were not filed in the clerk's office within the time prescribed by the statute. See R. L. c. 173, § 106; *Dorr v. Schenck*, 187 Mass. 542; *O'Connell, petitioner*, 174 Mass. 258; *Currier v. Williams*, 189 Mass. 214. The petition is to prove that part of the substituted bill which was thus disallowed by the judge. R. L. c. 173, § 110. The commissioner has found that the exceptions disallowed were not seasonably filed, and that the bill allowed by the judge is correct. The parties have, therefore, argued the questions presented by this bill. -

Shortly before the argument in this court, the petitioner filed a motion to amend his bill of exceptions. It is familiar law that this court has no power to allow an amendment of a bill of exceptions, and that, if there is any good reason for making such an amendment, the proper course of proceeding is to strike the case from the docket, and remit it to the court in which the exceptions were allowed, to enable the party to obtain an allowance of the amendment there. The motion on file does not suggest such action; but if it be taken as including a request for this action, there are good reasons why the motion should not be allowed at this time. In the first place, that part of the motion which relates to the declaration in set-off is immaterial, as the defendant was not entitled to introduce evidence in support of his declaration in set-off upon a hearing for an assessment of damages after a default. The declaration in set-off was in the nature of an independent claim, filed instead of bringing a

separate suit. On the defendant's default he lost his right to prosecute it.

The papers referred to do not show on their face that the plaintiff Squier failed to perform his duty properly; and it is never necessary to put in evidence the general laws of the Commonwealth. Besides, after protracted and expensive proceedings upon the petitioner's application to prove his bill of exceptions, this motion comes too late.

The record before us shows that the petitioner was defaulted in the original case, and on his motion the default was taken off. Afterwards he was again defaulted, and his subsequent motion to take off that default was denied. This denial was within the discretion of the presiding judge, and is not a subject for an exception. *Rogers v. Ladd*, 117 Mass. 834. *Commonwealth v. Quirk*, 155 Mass. 296.

The petitioner was not injured by the refusal of the judge to admit a copy of the paper removed from the original petition for a writ of certiorari. This was offered to prove that the attorney, Squier, was acting in bad faith. It was originally intended to be read and signed by the petitioner; it was so read and signed, and it had no tendency to show that the attorney was acting in bad faith.

It was within the discretion of the presiding judge reasonably to limit the cross-examination of the plaintiff by the petitioner. *Rand v. Newton*, 6 Allen, 88. *Commonwealth v. Nickerson*, 5 Allen, 518. *Demeritt v. Randall*, 116 Mass. 381. The petitioner cross-examined this witness from about noon until half past four o'clock, asking many questions which were excluded by the judge. About four o'clock he was told by the judge that he must close the cross-examination by half past four. There is nothing to show that this order was unreasonable, or that there was any evidence which the petitioner could reasonably expect to elicit by a further cross-examination of the witness.

It does not appear that the petitioner was injured by the refusal of the judge to admit the papers in the case of Barnes against Norton, administratrix, to prove that the pleadings showed on their face that certain statutes should have been set up in behalf of the petitioner by his attorney in that action. It cannot be assumed that the papers on their face would have

shown any such thing, and they are not made a part of the bill of exceptions.

As we have already intimated, the exception to the refusal to admit a portion of the Revised Laws in evidence is not well taken. The court takes judicial notice of the laws without their introduction in evidence. The entry must be

*Exceptions overruled.*

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MAURICE J. MOYNIHAN vs. CITY OF HOLYOKE.

Hampden. September 25, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Way, Defect in highway. Hyatt Lights. Negligence. Evidence, Remoteness. Practice, Civil, Exceptions.*

If a traveller on a highway of a city in cold and stormy weather falls and is injured from slipping on a portion of the sidewalk of the highway consisting of Hyatt lights made partly of glass set in cement or concrete, the surface of which is smooth and slippery and has grown more so from being walked on after it was put in, in an action against the city under R. L. c. 51, § 18, he is entitled to go to the jury on the question whether there was a defect in the highway which might have been remedied by reasonable care and diligence on the part of the city.

In an action against a city under R. L. c. 51, § 18, for injuries from a fall caused by slipping on Hyatt lights forming part of the sidewalk of a highway of the defendant, it is within the discretion of the presiding judge to admit or exclude evidence offered by the defendant to show "that the walk was of the usual and ordinary construction for that kind of a walk," and, even if in the opinion of this court the discretion of the presiding judge would have been exercised better by admitting the evidence, its exclusion by him is not a ground of exception.

TORT under R. L. c. 51, § 18, against the city of Holyoke for injuries alleged to have been caused by a defect in the sidewalk of Dwight Street, a public highway which the defendant was bound to keep in repair. Writ dated January 27, 1905.

In the Superior Court the case was tried before *Hitchcock, J.* The character of the alleged defect is described in the opinion.

The plaintiff testified that he had lived in Holyoke a long time; that he lived on Dwight Street; that he was going down

Dwight Street to High Street on January 4, 1905, about 8 A. M.; that when upon the sidewalk in question he fell very suddenly and stayed there; that the wind was blowing "quite hard" and the snow was drifting; that it drifted "quite a good deal" on the street and pretty well on the sidewalk; that the roadways were impassable; that the side of the walk in question next to the street was covered with snow and the inside was practically bare with a little snow sifted over it; that the place was wet; that he fell on the inside on the glass part of the walk; that where he fell was practically bare, with only a little snow; that he could not say how he fell; that he went down so suddenly he had no idea how it happened any more than that he heard "quite a noise" from his fall; that he fell on the right side he should judge toward the block; that his feet slipped from under him; that the walk there is made partly of glass; that the part he fell on was glass, very smooth; that he did not notice the walk until after he fell on it to know how long it had been smooth; that he noticed it in particular after he got well.

Certain evidence, which was offered by the defendant and was excluded by the judge against the defendant's objection and exception, is described in the opinion.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence in the case the plaintiff was not entitled to recover, and that upon all the pleadings and the evidence there was no liability on the part of the defendant and the jury must find for the defendant. The judge refused to rule as requested and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$500. The defendant alleged exceptions.

*M. J. Griffin*, for the defendant.

*T. B. O'Donnell*, for the plaintiff.

KNOWLTON, C. J. The plaintiff fell upon a sidewalk of the defendant city and was injured. The sidewalk was ten feet wide, and for about five feet of that width, next the McAuslan building, the surface was made partly of glass, commonly known as Hyatt lights, set in cement or concrete. There was evidence that this part of the walk was smooth and slippery at the time of the accident, some of the testimony tending to show that it had grown more smooth from the walking upon it after it was

put in, and other testimony tending to show that it was less smooth than when new. There was evidence that there was a slope in the walk longitudinally of about two and one half inches in ten feet, and that there was about the same slope from the side of the building to the curbstone.

The first question arises upon the defendant's request for an instruction that upon all the evidence the plaintiff was not entitled to recover.

There was testimony from which the jury might well find that the plaintiff was in the exercise of due care.

The more important question is whether the city could be found guilty of negligence because of the slippery condition of the walk. It is not contended that there was a liability on account of any slipperiness caused by the weather, which was cold and stormy. The sole contention of the plaintiff is that there was negligence in allowing a construction and condition of the walk which rendered it slippery, whether from the material of which it was composed, or from the travel over it, or from both.

In this respect the case is very similar to *Cromarty v. Boston*, 127 Mass. 329, in which it was held by a majority of this court that one who slipped upon one of "Hyatt's patent covers," that had become smooth and slippery by wear, was entitled to go to the jury on the question whether the condition constituted a defect in the sidewalk. This case arose before the enactment of St. 1877, c. 234, now embodied in the R. L. c. 51, § 18, and the court was careful to point out, what is shown in other cases, that, under the law then existing, a city might be liable for an accident if a way was not reasonably safe and convenient for travellers, even when there was no negligence on the part of the city. See *George v. Haverhill*, 110 Mass. 506. Where the alleged defect consists of an improper construction that leaves the sidewalk slippery, or of slipperiness from long continued wear, that could readily be discovered, we think the question whether the walk is defective under the old law is so nearly like the question whether the city or town is negligent under the present law, that the change in the statutes is of little consequence to the decision of the case. While the subject is by no means free from difficulty, we are of opinion that there was evi-

dence on this point which justified the submission of the case to the jury.

The defendant offered to show by two witnesses, one of whom had had an experience of twenty years as a city engineer of another city, and the other a long experience as a superintendent of streets, "that the walk was of the usual and ordinary construction for that kind of a walk." An exception was taken to the exclusion of the testimony.

The general question involved in this exception was carefully considered in *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 579. There the rule is recognized that, on the question whether the use of a particular machine or appliance by the defendant is negligent, the fact that it is in common use by others is ordinarily helpful, and competent as evidence. Numerous cases are cited in support of the proposition. On the other hand, the danger that may arise from being led into collateral inquiries is also recognized, as well as the consequent rule that, in determining the admissibility of such evidence, much must be left to the discretion of the presiding judge. The opinion also refers to the fact that, because of the difficulty of finding conditions identical or very similar in different places, and because of the trial of collateral issues that might be involved, such evidence has generally been excluded in actions against towns for accidents upon highways, and in other similar cases. But in all of these cases the real questions are: How far will the testimony be helpful as bearing on the propriety or impropriety of the defendant's conduct? and How great will be the probable difficulty in obtaining and testing it? In the present case, upon one aspect of the evidence, the only question was whether the defendant was negligent in using or permitting to be used in the construction of its sidewalk, a material for the surface which, very likely, is in common use in cities, and generally recognized as suitable. In this respect the inquiry was similar to the question whether a certain kind of machine used by a defendant is in common use for similar purposes.

On the other hand, the offer of proof was broad and general, and seemed to apply to the construction of the sidewalk in every particular. It was of a kind which the courts have generally declined to receive, for the reasons already referred to. It was



held in the case last cited, and it had often been held before, that the admission or exclusion of such evidence must be left very largely to the discretion of the presiding judge. The bill of exceptions does not show such facts in regard to Hyatt lights, and the way they have been used in this sidewalk and in other sidewalks, as to make it plain that there was error of law in excluding the offered evidence. It seems probable that the admission of it would not have introduced such troublesome collateral inquiries as to interfere with the general course of the trial, and that it would have put before the jury facts that legitimately bore upon the question of the defendant's negligence. We are of opinion that the discretion of the court would have been better exercised if the testimony, so far as it related to the Hyatt lights, had been admitted; but we cannot say that the judge was bound, as matter of law, to receive it.

*Exceptions overruled.*

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WILLIAM J. CORBETT vs. MICHAEL CRAVEN.

Hampden. September 26, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Equity Pleading and Practice, Decree. Judgment. Res Judicata.*

A decree in a suit in equity of "Bill dismissed" is a final decree upon the merits. Between the parties to a suit in equity or an action at law or their privies a final decree or judgment on the merits includes and disposes of everything that was litigated or might have been litigated in the case brought by the plaintiff before the court.

A decree of "Bill dismissed" in a suit in equity by the trustee of the estate of a bankrupt, to set aside certain bills of sale and to obtain possession of personal property in the hands of the defendant received by him from the bankrupt, is a bar to an action of tort against the same defendant, by one who while the suit in equity was pending purchased from the trustee certain personal property of the bankrupt not covered by the bills of sale, for the alleged conversion of this property, if the property alleged to have been converted was included in the property claimed by the trustee as plaintiff in the suit in equity, although the parties in that suit may have omitted to distinguish it from the property described in the bills of sale.

TORT for the alleged conversion of certain machinery of woollen mills. Writ dated March 28, 1905.

The answer as amended alleged that such title as the plaintiff has in the property described in his declaration he acquired on September 18, 1901, by purchase from Nathan P. Avery of Holyoke in his capacity of trustee in bankruptcy of the estate of James Connor of Holyoke; that previously, on August 15, 1901, Avery as such trustee filed in the Superior Court in the county of Hampden a bill in equity against the defendant in this action alleging that the property in question was claimed by the defendant but that it belonged to him as trustee as aforesaid, and praying that the title and possession of the property be decreed to him as such trustee; that the defendant admitted claiming the property and denied Avery's title, and the case was tried on the merits on the issue of the title as of the day of the date of the bill; that the findings were against the plaintiff in equity, Avery, and in favor of the defendant; that a final decree was entered dismissing the bill; that this decree now remains in full force and unreversed; and that the question of the ownership of the property in question has been fully adjudicated.

At the trial in the Superior Court before *Hitchcock*, J. the following facts appeared:

From a date earlier than October 12, 1883, to June 18, 1901, James Connor of Holyoke was engaged in the manufacture of woollen cloth and shoddy in two mills in that city known as the New York Mill and the Bigelow Street Mill. The New York Mill contained eleven sets of woollen machinery. A set of woollen machinery is a set of cards, together with the necessary complement of looms, spinning, finishing machinery, etc. The quantity and kind of machinery constituting the complement of a set of cards is determined by the character of the required product in any given case. In the case at bar changes in the product from time to time made necessary or expedient the purchase and addition of some of the machinery described in the plaintiff's declaration. The Bigelow Street Mill contained four sets of woollen machinery. On October 12, 1883, Connor sold to Michael Craven, the defendant, four sets of woollen machinery in the Bigelow Street Mill evidenced by a bill of sale, of which the following is a copy:

"Holyoke, Mass., Oct. 12, 1888.

"Michael Craven,

"Bought of Connor Bros.

"4 Entire Sets Woolen Machinery stored in  
Woolen Mill, corner of Cabot & Bigelow  
Streets for Ten Thousand Dollars, \$10,000.

"Received payment,

"Connor Brothers."

On April 6, 1885, Connor sold to Craven eleven sets of woollen machinery including all the machinery, tools, shafting, etc., then owned by him in the New York Mill, evidenced by a bill of sale of which the following is a copy:

"Holyoke, Mass., April 6, 1885.

"Michael Craven, South Deerfield, Mass.,

"Bought of Connor Brothers.

"Eleven sets of Woolen Machinery for Twenty  
Thousand Dollars, \$20,000

and other valuable consideration, the same being free from all incumbrances and includes all of the machinery, tools, shafting and hangers, bought of Henry Hilton, now on the premises described hereafter, with all machinery and improvements added thereto since said purchase. Said machinery is at present stored in the brick woolen mill buildings owned by the Holyoke Water Power Co., situated on Main street, Holyoke, and known as the New York Mill.

"Received payment,

"Connor Bros."

Immediately after the sale of April 6, 1885, Craven leased to Connor by oral agreement the property acquired by him by these two purchases upon Connor's oral agreement to pay a certain annual rental, and also to pay taxes, insurance and to make repairs. The defendant contended at the trial that, in addition, Connor agreed "to keep up the depreciation, or to keep depreciation good." This was denied by the plaintiff. Connor continued to use the property as such lessee until his bankruptcy in 1901. On March 10, 1891, Connor bought twenty

Knowles broad looms and installed ten of them in the Bigelow Street Mill and ten in the New York Mill, and on the same date sold them to Craven, as evidenced by a bill of sale, of which the following is a copy:

“ Holyoke, Mass., March 10, 1891.

“ Michael Craven,

“ Bought of Connor Bros.

“ 10 ‘ Knowles ’ Broad Looms, \$275, \$2,750

stored for said M. Craven in Bigelow Street  
Woolen Mills, Cor. of Cabot St.

“ 10 ‘ Knowles ’ Broad Looms, \$275, \$2,750

stored for said M. Craven in New York  
Mills on Main St. Cor. of South St.

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\$5,500

“ Received payment, .

“ Connor Bros.”

On June 18, 1901, Connor was adjudicated a bankrupt.

On August 3, 1901, Nathan P. Avery, Esquire, of Holyoke, was appointed trustee in bankruptcy of Connor's estate, and on August 6, 1901, he qualified by filing a bond. On August 15, 1901, Mr. Avery, as such trustee, brought a bill in equity against the defendant Craven in the Superior Court, seeking to set aside the conveyance of the personal property to Craven and to acquire possession of that property. The bills of sale therein referred to were the same as those above set forth. The material portions of the bill are quoted in the opinion. The case was referred to a special master who filed a report. On March 31, 1902, the Superior Court made a decree that the bill be dismissed with costs.

On September 18, 1901, Avery as trustee sold to William J. Corbett, the plaintiff, all the woollen machinery of the estate not covered by the bills of sale to Craven, which included the machinery for the conversion of which this action was brought. At the time of making this sale the trustee was almost wholly ignorant of the amount of machinery not covered by the bills of sale.

After April 6, 1885, and before June 18, 1901, Connor purchased and added to the machinery in the two mills from time

to time certain machines, parts of machines and other manufacturing implements besides the twenty Knowles broad looms heretofore referred to, and all of the property sued for in this action was property so added after April, 1885. Such additions were of less value than the machinery conveyed to Craven. All the machinery in the shoddy mill building at the Bigelow Street Mill and some of the machinery in the woollen mill building at the same mill belonged to Connor and passed to Avery, trustee, and never belonged to Craven, but was sold by the trustee before the sale to the plaintiff.

At the trial the parties agreed in writing to the following facts:

"1. Mr. Avery never acquired any interest or title in the goods sued for other than such interest or title as he acquired by virtue of being appointed trustee in bankruptcy of Connor.

"2. All the property mentioned in the declaration was from the date of Connor's adjudication in bankruptcy to the date of the dismissal of the equity suit, Avery, Trustee *vs.* Craven, located in the buildings and rooms therein specified in the declaration, and none of the property so mentioned was included in the exceptions set out in paragraph numbered three of the bill of complaint in the equity suit.

"3. Such title as the plaintiff has was acquired by virtue of a sale on September 18, 1901, by Avery as trustee, of all the machinery of the bankrupt estate not covered by the bills of sale given by Connor to Craven, the defendant, on October 12, 1883, April 6, 1885, and March 10, 1891."

4. That certain items named by their numbers should be stricken from the declaration.

At the trial it was contended by the defendant that all the property described in the declaration passed to him by virtue of the condition in the contract of letting that Connor should keep the depreciation good. It further was contended by the defendant that at each of the different times when additions were made to the plant by Connor, certain oral agreements were made by Connor with the defendant, by virtue of which the defendant gained title to all of the property in controversy.

The defendant requested the court to make the following rulings:

"1. On all of the evidence the plaintiff cannot recover.

"2. The record of Avery Trustee v. Craven and the agreed facts preclude the plaintiff from recovering.

"3. The decree in Avery Trustee v. Craven constitutes a bar to the plaintiff's recovery in this action.

"4. The decree in Avery Trustee v. Craven is a conclusive determination that Avery, as against Craven, did not own the property in question in this suit and is binding on Corbett who purchased from Avery while that suit was pending.

"5. The decree in Avery Trustee v. Craven is conclusive by way of estoppel that Avery, as against Craven, did not own the property in question in this suit and also concludes Corbett who purchased from Avery while that suit was pending."

The judge refused to make any of these rulings and submitted the case to the jury under instructions not excepted to. The jury returned a verdict for the plaintiff in the sum of \$4,696.02; and the defendant alleged exceptions.

*C. H. Beckwith*, for the defendant.

*C. T. Callahan*, for the plaintiff.

KNOWLTON, C. J. This is a suit for the conversion of certain machinery. The question presented by the bill of exceptions is whether the plaintiff is barred by a former decree for the defendant in a suit in equity. That suit was brought by the person from whom the present plaintiff took his title *pendente lite*, and the decree is binding not only upon the parties to it, but upon their privies. There is no dispute that the present plaintiff is affected by it as the plaintiff in that suit would have been if he had not parted with his title. *Sawyer v. Woodbury*, 7 Gray, 499, 502. *Borrowscale v. Tuttle*, 5 Allen, 377. *Haven v. Adams*, 8 Allen, 363. The decree was "Bill dismissed," which is a final decree upon the merits that settles forever all matters involved in the suit. *Snell v. Dwight*, 121 Mass. 348. *Foote v. Gibbs*, 1 Gray, 412.

If the question were, What is the effect of the judgment in a collateral proceeding? the case would be different, and the answer would be, Only to settle such matters as were actually tried and adjudicated. But as a final disposition of the case, a judgment on the merits includes everything that was litigated, or that might have been litigated, in the case brought by the plaintiff

before the court. *Foye v. Patch*, 132 Mass. 105, 110. *Watts v. Watts*, 160 Mass. 464, 465. *Butrick, petitioner*, 185 Mass. 107, 113. There is nothing in the decision in *Waterhouse v. Levine*, 182 Mass. 407, adverse to this view, although some of the language in the opinion is broader than the case called for. The cause of action in that suit was not the same as that to which the judgment in the former action related, but came into existence after the former action was brought. Although the two actions related to the same transaction, it was competent to show that the last was for a cause of action which had lately arisen, and which could not be affected by a judgment founded on different conditions existing previously.

We are, therefore, brought to the question which has been most discussed, namely, whether the suit in equity included the present cause of action. The plaintiff in equity was the trustee of one Connor, a bankrupt, and he averred in the third clause of his bill "that the said bankrupt owns and has located in the brick buildings at No. 649 Main street in said Holyoke, called the New York Mills, all the machinery, tools and manufacturing implements located in said mills and all machinery in the mills situated at the corner of Cabot and Bigelow streets in said Holyoke, called the Bigelow Street Mills of the Holyoke Water Power Company, of great value and all of which property is claimed to be owned by Michael Craven of Springfield in said county." Then followed an exception of certain machinery which is immaterial to this case. The present action is to recover for a conversion of a part of the machinery in these mills. In the fourth clause of the bill, after an averment in regard to the purchase "of all of the above described personal property" by the bankrupt, the plaintiff charged, "that later in the years 1883 and 1885 and 1891 Michael Craven claims that the property was conveyed to him on the payment of certain amounts." In the fifth clause he charged "that the said Michael Craven did not make the purchase of any of the personal property above mentioned," and that his alleged title was fraudulent as against creditors.

The defendant's answer was an admission "that he claims to be the owner of certain machinery, tools and manufacturing implements located in the New York Mills, and all the machinery

in the Bigelow Street Mills, excepting . . . as alleged in the third paragraph of the plaintiff's bill, and says he became the owner thereof by purchase from said James Connor in the years 1883, 1885 and 1891." The other admissions of the answer are immaterial, and there was a denial of all allegations not expressly admitted. In his prayer for relief the plaintiff asked, among other things, that the title to all this personal property be decreed to be in him.

Here, then, was an issue including all the property referred to in the present action, and by a decree dismissing the bill the issue was determined in favor of the defendant. It now appears that the principal matter to which the testimony at the hearing in equity was directed was the property covered by the three bills of sale given by Connor to the defendant. There was other property in these mills which was not included in these bills of sale, which the defendant contends passed to him from Connor, under other agreements. In regard to this the jury in the present action has found for the plaintiff. But if it was included in the claim made by the bill in equity, the decree in that suit was final and conclusive as to the title, even if the parties omitted to distinguish the property from that described in the bills of sale.

The language of the bill is plainly inclusive of it, and there is nothing in the answer that limits the issue tendered by the plaintiff in the statement of his claim and of the defendant's adverse claim. The jury should have been instructed in accordance with the contention of the defendant.

*Exceptions sustained.*



WILLIAM T. FORBES, Judge of Probate, vs. MARY L. KEYES  
& another.

Worcester. October 1, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Executor and Administrator. Bond. Estoppel. Waiver.*

An executor with the consent of the devisees under the will of his testator may collect the rents of real estate or occupy real estate of his testator, accounting for the income to the Probate Court as provided by R. L. c. 150, § 6.

It is not a breach of an executor's bond for the executor, when there is sufficient personal property to pay all debts and charges of the estate, to make an attempted sale and conveyance of real estate of his testator, erroneously supposing that the will gives him power to make such a sale when in fact it does not.

If an executor, when there is sufficient personal property to pay all debts and charges of the estate, makes attempted sales and conveyances of real estate of his testator, erroneously supposing that the will gives him power to make such sales when in fact it does not, and the devisees under the will, instead of asserting their title to the real estate, accept and receipt for large sums of money received by the executor from these sales of real estate without making any objection to the validity of the sales, the title conveyed or the prices received, and assent to the accounts of the executor in which he has charged himself with the proceeds of the sales, they are estopped to question the propriety of the action of the executor in making the sales or to allege this action as a breach of his bond.

Where an executor fails to file an account in the Probate Court within the time required by his bond, but afterwards files an account and three years later files another, and this second account is allowed with the consent of all the parties interested, such consent to the allowance of the account is a waiver of all previous breaches of the bond in not rendering an account.

No action under R. L. c. 149, § 23, can be maintained on an executor's bond for a failure to pay the shares in a residuum of the estate of his testator where there has been no previous demand for such payment.

Whether when a residuum under a will is to be distributed a decree of distribution is necessary, *quæres*.

RUGG, J. This is an action duly brought in the name of the judge of probate for the county of Worcester against Mary L. Keyes and George N. Keyes, as executors of the will of Israel N. Keyes, upon their joint bond as such executors. The declaration alleges as breaches of the bond: 1. A management of the estate without authority of law or of the will, so as to gather into the hands of the executors large sums of money from rents and sales of real estate of the testator. 2. A failure to account to the

Probate Court at the expiration of one year from the date of their bond. 3. A demand by the legatees upon the executors at the expiration of one year from the date of their bond for the property due them under the will, and a refusal of payment by the executors. 4. An ascertainment by accounting in the Probate Court of the sums gathered into the hands of the executors from all sources, a demand for payment to the legatees and a refusal by the executors. The defendants pleaded a general denial, and later George N. Keyes pleaded an adjudication of bankruptcy on March 29, 1904, and a discharge thereon on June 21, 1904. The report shows that Israel N. Keyes died on April 23, 1897. The defendants were duly appointed executors, and qualified by giving their bond, which was approved on May 11, 1897. An inventory was duly filed, exhibiting both real and personal estate of the testator. Rents of the real estate were collected regularly by the executors until October, 1897, when the defendant Mary L. Keyes removed to California, where she has since resided. After this time she did not return to Massachusetts, but she permitted George N. Keyes to transact all business connected with the estate, she having no personal part in the management thereof. At various times, before and after October, 1897, the executors, under a supposed and assumed authority to sell conferred by the will, executed and delivered as such executors deeds of divers parcels of real estate belonging to the testator, receiving large sums of money therefor. In August, 1903, certain legatees filed their petition in the Probate Court, asking for a construction of that portion of the will of the testator, which the executors had theretofore assumed conferred the authority to sell real estate. A decree was duly entered thereon, from which no appeal was taken, to the effect that, there being sufficient personal estate to pay the debts of the testator, funeral expenses and charges of administration, the will did not authorize a sale of real estate. The sales of real estate were made by the executors under the legal advice that the will conferred authority to make such sales, and no objection has been made at any time by any party in interest to the validity of the sales, the title conveyed or the amounts received therefrom, and a partial distribution of the proceeds of such sales and of other assets indiscriminately was made and accepted by the beneficiaries under

the will, and receipts were given therefor without objection. The amount of such sales, after Mary L. Keyes left this Commonwealth, amounted to more than \$70,000.

On November 9, 1900, George N. Keyes filed in the Probate Court the first account of the administration of the estate, in response to a citation from the Probate Court, Mary L. Keyes not participating in nor having actual knowledge of the preparation of the account. The caption was "The first account of Mary L. Keyes and George N. Keyes, as rendered by the latter." On November 4, 1903, "The second account of Mary L. Keyes and George N. Keyes, as rendered by the said George N. Keyes" (as stated in the caption) was filed in the Probate Court. The latter account was prepared under the direction of counsel for the estate, who was the agent of said Mary L. Keyes, she first knowing of its preparation and filing some months afterwards. Both of these accounts were referred by the Probate Court to an auditor, who, under decrees not objected to, stated new accounts for the executors. After some corrections made by the auditor, and with items of balance from the first account, which was also allowed by the Probate Court, the second account was by the consent of all interested parties allowed by the Probate Court on November 27, 1903. The caption of this account as allowed by the court was "The second account of Mary L. Keyes and George N. Keyes," and was for a period ending with the first day of October, 1903, the two accounts together covering the period from the date of the appointment of the executors to the last named date. From decrees allowing these accounts no appeal was taken. Subsequently to the allowance of these accounts Mary L. Keyes by petition sought to be relieved from being jointly charged with her co-executor. Proceedings in this behalf were terminated adversely to her after the present action was begun. The second account showed a balance in the hands of the executors of \$14,845.78.

Mary L. Keyes did not file an appointment of an agent as required by R. L. c. 139, § 8, until after a petition had been filed for her removal as executrix, on the ground of such failure, nor until August 1, 1903, since which time no proceedings have been had on that petition.

Under the terms of the report, if the evidence sustains the

ruling of the Superior Court for the plaintiff, judgment is to be entered against the defendant Mary L. Keyes for the penal sum of the bond ; otherwise, for that defendant. We are, therefore, brought to the inquiry whether Mary L. Keyes, upon these facts, has made any breach of her bond, of which the plaintiff can now complain.

The first claim of the plaintiff is that the estate has been so managed, without authority of law or of the will, as to place in the hands of the executors large sums of money from rents and sales of real estate. The collection of rents of real estate by consent of the devisees, or the occupation of real estate by one of the executors, (which appears to have been the source of some of the rents charged against them in the accounts of these executors,) is permitted by statute, and decisions of this court recognize money so received as assets properly in the hands of an executor or administrator. R. L. c. 150, § 6. *Stearns v. Stearns*, 1 Pick. 157. *Almy v. Crapo*, 100 Mass. 218. *Brooks v. Jackson*, 125 Mass. 307. It was no breach of the bond for the executors to attempt to sell the real estate. If the will conferred no authority upon them to make the sale, then their act in attempting to convey title was a nullity, and the rights of the devisees under the will were not affected thereby. A pretended conveyance made under an assumed power of sale conferred by a will, which by true construction does not confer the power, all being a matter of public record, cannot operate to deprive the devisees of their title, provided they seasonably undertake to assert it, and do not accept the fruits of the sale. *Thayer v. Winchester*, 133 Mass. 447. But all the parties in interest have assented to the account of the executors, by which they were charged with the proceeds of the sales, and the devisees have accepted and receipted for large sums of money received from these sales of real estate and have at no time made any objection to the validity of the sales, to the title conveyed, or to the prices received. Under these circumstances, the devisees are estopped to claim that this action of the executors constituted any breach of the bond. The acquiescence of all the parties in interest has proceeded too far to permit them now in this proceeding to question the propriety of these acts.

The next breach of the bond alleged is a failure to account to

the Probate Court. Although no account was filed in accordance with the tenor of the bond, yet one account was filed on November 9, 1900, and another on November 4, 1903, and this second account was allowed with the consent of all interested parties. An allowance of an account, under these circumstances, was a waiver of all previous breaches of the bond in not rendering an account, on the part of all those consenting to the allowance. *McKim v. Harwood*, 129 Mass. 75. Since the filing and allowance of the second account, there has been before the bringing of the present suit no breach of the bond in not accounting, as there has been no order of the court requiring an account, and one year had not elapsed since the filing of the last previous account. R. L. c. 149, § 1, cl. 3.

The third and fourth allegations of breach of the bond are of failures to pay to the legatees upon demand the property due them under the will. These allegations are not supported by any evidence, for the report shows that no demand has been made at any time by any of the legatees or devisees for payment of the amounts due under the account, and there is no evidence that any previous demand was ever made. It is to be observed that no final account has been filed, and that the last account was entitled and allowed as a second account. It is further to be noted that, although the balance in the hands of the executors is made up partly of receipts from sales of real estate, partly of rents of real estate, and partly of personal property of the testator, and the residuum of the estate is in part to be distributed among persons of a class (R. L. c. 141, § 22), yet there has been no decree of the Probate Court as to the persons to whom payment should be made or amounts to which the several residuary legatees may be entitled. Without discussing the bearing of these two considerations upon the plaintiff's right to recover, we treat as the single question under this branch of the case, whether an action can be maintained upon a probate bond for a failure to pay the shares in a residuum of a testate estate without a previous demand. It appears to be settled by authority in this Commonwealth that an action cannot be maintained upon a bond given by an executor for the faithful discharge of his duties, for the use and benefit of legatees on account of a failure to pay legacies, without proof of a previous demand. As was

said in *Prescott v. Parker*, 14 Mass. 429, "Until such a demand, the executor cannot be reasonably said to have been guilty of a breach of his trust, or even of a neglect of duty." To the same point see *Paine v. Moffit*, 11 Pick. 496; *Dawes v. Sweet*, 14 Mass. 105; *Miles v. Boyden*, 3 Pick. 213; *White v. Webster*, 13 Pick. 374; *Leland v. Kingsbury*, 24 Pick. 315; *Newcomb v. Williams*, 9 Met. 525; *Conant v. Stratton*, 107 Mass. 474, 483; *Choate v. Jacobs*, 136 Mass. 297; *Brigham v. Elwell*, 145 Mass. 520. Although it may be true that Mary L. Keyes, having given a joint bond with George N. Keyes, is jointly responsible for such assets as may have come to their joint possession (*Ames v. Armstrong*, 106 Mass. 15), the report does not disclose such joint maladministration or individual wrong on her part, either in the respects pointed out in the declaration or otherwise, as warrants an action under R. L. c. 149, § 23, without a previous demand for payment of legacies. It is not necessary now to decide whether there should be a decree for distribution.

Under the terms of the report, no judgment can be entered against the defendant, George N. Keyes, although it does not appear why he is thus exonerated. See U. S. St. of July 1, 1898, c. 541, § 17; *Crawford v. Burke*, 195 U. S. 176. We do not therefore consider any questions which the report might raise as to him.

The entry must be

*Judgment for the defendant Mary L. Keyes.*

*J. S. Gould*, for the plaintiff.

*H. F. Harris & W. H. Whiting*, for the defendants.

MARY E. GILMORE vs. MILFORD AND UXBRIDGE STREET  
RAILWAY COMPANY.

FRANK H. GILMORE vs. SAME.

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

Whether a street railway company which sees fit to use as a motive power a force so imperfectly understood as electricity might not be liable for an injury to a passenger caused by a flash from the controller of a car although the flash could not have been prevented by any means that yet have been devised or by any care that could be exercised, *quaere*.

In an action against a street railway company for personal injuries from being struck by the elbow of a fellow passenger who was pushed and fell upon the plaintiff by reason of a burst of flame from the controller of an electric car of the defendant on which the plaintiff was a passenger, there was evidence that the flame illuminated the whole vestibule of the car and all the vicinity, that it seemed as though the whole front vestibule of the car was on fire, that the coat of a passenger who stood in the vestibule with the motorman was struck by the flame and its wearer could see a very slight mark on it the next morning, that there was dense smoke which affected the sight of this passenger until the next day, that the flame was a continuous one "with equal force" and lasted a quarter of a minute or more, that when the door into the front vestibule was opened a volume of smoke came into the car, that the plaintiff all at once heard a noise and turned and looked and the front vestibule seemed to be all ablaze, that when the door was opened the flame seemed brighter, that the plaintiff could see it as high as the door, and that a dense smoke and a stifling smell came into the car. *Held*, that there was evidence warranting a finding that the flame was not the instantaneous and harmless flame which results from a flash from a controller when in proper condition, but was attended by unusual results which would not have occurred if the controller had been in proper condition and that if proper care had been exercised there would have been no such flame, and that the plaintiff was entitled to go to the jury.

MORTON, J. These two actions were tried together, and there was a verdict for the plaintiff in each. The first is for personal injuries received by a married woman while a passenger in one of the defendant's cars from Hopkinton to Milford, and the second is by her husband for loss of services and for expenses incurred by him on account of the injury to her. The cases are here on exceptions by the defendant to the refusal of the judge

to direct verdicts for the defendant and to rule that on all the evidence neither plaintiff could recover.

The accident was caused by an explosion or a burst of flame or a flash from the controller on the car on which the female plaintiff was. The defendant contends that there was no evidence warranting a finding that what occurred was due to negligence on its part, and that it was the case of an ordinary flash from the controller which there is no way to prevent, and the occurrence of which would not therefore import negligence on its part. It further contends, though this is, perhaps, included in the statement of its contention already made, that there was no evidence of failure on its part to properly inspect the controller.

The defendant's contention implies that it is not liable for an injury caused by a flash from the controller which could not be prevented by any means that have yet been devised or any care that could be exercised. We doubt the correctness of that proposition. It would seem that if the company sees fit to use a force which is so imperfectly understood that no method has yet been devised for preventing a flash from the controller, the company and not the passenger should bear the risks arising from its use.

But however that may be there was testimony tending to show that what occurred was much more than an ordinary flash from the controller. A witness who stood in the vestibule with the motorman testified *inter alia* that "the flame illuminated the whole vestibule and all the vicinity. The flame struck his coat and he could see a very slight mark there the next morning. . . . There was some smoke. The fumes from whatever burned and the smoke there were dense; . . . he was also affected in his sight very badly that evening; . . . the next morning he felt the effects a little, but not so much. . . . As near as he could put it, the length of time of the flame would be a quarter of a minute, or a little more possibly." On cross-examination he testified that "the flame was a continuous flame with equal force." Another witness testified, "that as soon as he saw the flash in the front vestibule the passengers seemed to rise up around him and make a rush towards the back of the car, that he got excited himself and looked up and it seemed as though



the whole front vestibule of the car was on fire. . . . As near as he could judge the flame lasted from fifteen to twenty seconds." Still another witness testified that, "we went along all right until we got to the town house. Then a sort of a report and the car was illuminated in the front vestibule and I thought the front of the car was all aflame. . . . He should say that it lasted about eighteen seconds. . . . When the door was opened [i. e. the door into the front vestibule] a volume of smoke came into the car." The female plaintiff testified, "that when the car got in the vicinity of the town house, all at once she heard a noise and turned and looked and the front vestibule seemed to be all ablaze, and the passengers seemed to be scuffling around in there, and heard the door opened and the passengers in the car all jumped to their feet as far as she could see on both sides of the car. They all seemed to push as though they were trying to leave the car.\* The flame was just a bright light and seemed to illuminate the whole vestibule, and when the door was opened it seemed brighter. She could see it as high as the door. A dense smoke came into the car, and a stifling smell. Should think the flame lasted a quarter of a minute or more." There was testimony tending to contradict the statements thus made and to show that what occurred could not have been so serious as thus represented. But it was for the jury to say what the nature of the occurrence was. With slight adaptations the language used by Mr. Justice Hammond in delivering the opinion of the court in *Cassady v. Old Colony Street Railway*, 184 Mass. 156, 161, will, we think, apply here. "The jury upon the evidence may have found that the flame in this case was not the instantaneous and harmless flame which results from [a flash from a controller] when in proper condition; that [the flame] was attended with unusual results which would not have occurred if the [controller] had been in proper condition, and that the most reasonable conclusion was that if proper care had been exercised there would have been no such flame." The defendant introduced evidence tending to show that it exercised proper care and diligence in inspecting the controller. But the weight to be given to this evidence was clearly for the jury. The result

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\* The plaintiff was injured from being struck in the groin by the elbow of a passenger who was pushed and fell upon her.

is that we think that the exceptions must be overruled in both cases.

*So ordered.*

*W. Williams, J. C. F. Wheelock & G. B. Williams*, for the defendant.

*J. B. Ratigan, J. E. Swift & J. J. Moynihan, Jr.*, for the plaintiffs.

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REASON T. LEE & others, trustees, vs. METHODIST EPISCOPAL CHURCH IN THE UNITED STATES & others.

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Religious Society. Trust. Deed. Equity Pleading and Practice, Master's report. Evidence, Extrinsic affecting writings.*

A conveyance of land, recited to be in consideration of one dollar and other valuable considerations paid by certain persons as trustees of an unincorporated religious society named, to such "trustees, their heirs and assigns forever," to have and to hold to the grantees, "trustees, and their heirs and assigns, to their own use and behoof forever," paid for by money raised and contributed by the members of the unincorporated religious society, creates only such a trust as results from the payment of the money, the nature of which in this case the court found it unnecessary to consider.

For a period of about thirty-seven years the pastors of an unincorporated religious society were appointed by a certain church organized under the laws of another State. For the first twenty-four years of this period the unincorporated society was known as a "mission" and was not supplied regularly with a pastor, but during the last thirteen years of the period it was known as a "station" and a pastor was assigned to it annually by the incorporated church. The salary of the pastor thus assigned was paid by the unincorporated society. It did not appear that the unincorporated society ever had been dedicated as a church connected with the incorporated church or that any formal union between the two organizations ever existed. In a suit in equity by persons appointed as trustees by the incorporated church, to establish control over the church building and the lot of land used by the unincorporated society, it was *held*, that the plaintiffs had failed to show any right of property, possession or control of the land and building.

On an appeal from a decree in a suit in equity confirming a master's report it is not open to the appealing party to contend that the master erred in excluding certain evidence offered by him if he took no exception to the report based on the exclusion of the evidence by the master.

Where in a suit in equity a party desires to prove that a conveyance of land to certain persons called trustees to their own use was upon a certain trust,

although it may be important to show what trust should have been declared by the grantees or what trust resulted from the payment of the purchase money, the intention of the grantor in making the deed is immaterial and cannot be shown.

If land and a building thereon have been conveyed by a deed to certain persons as trustees, to hold in trust for a religious society, the appointment of new trustees by the society, although valid, does not transfer the title to the land and building without a deed.

THE following statement of the case is taken from the opinion of the court :

This case comes before us on an appeal from a decree confirming a report made by a master and dismissing the plaintiffs' bill. Exceptions were taken to the master's report, which are impliedly overruled by the decree in question.

The master found that for forty years last past there has been in the city of Worcester an unincorporated religious society by the name of the Bethel African Methodist Episcopal Church. We shall speak of it hereafter as the Bethel Church. The contest here is in effect between two corporations of the same religious faith, for the control of the church building used by the Bethel Church and the land on which it stands, to wit, the African Methodist Episcopal Church of America, chartered under the laws of Ohio, and the Methodist Episcopal Church in the United States, incorporated under the laws of New York. We shall speak of them hereafter as the African Methodist and the Methodist Churches respectively.

For the twenty-six years of its existence previous to 1892 the Bethel Church held services in a hall hired for the purpose. On April 14, 1892, the land in question was conveyed by one Merrell, who then owned it, to Amos F. Jackson and three others. This deed stated that in consideration of one dollar and other valuable considerations paid by Jackson and the others "all of the city and county of Worcester and Commonwealth aforesaid, as trustees of Bethel African Methodist Episcopal Church," the land is conveyed to Jackson and the others, "trustees, their heirs and assigns forever," to have and to hold to the grantees, "trustees, and their heirs and assigns, to their own use and behoof forever." The master finds that the land and building were paid for with money raised and contributed by the members of the Bethel Church.

From the beginning up to June, 1904, the pastors of the Bethel Church were appointed by the African Methodist Church. Until 1891 the Bethel Church was known as a "mission"; after 1891 as a "station." While a mission it was not regularly supplied with a pastor, but since it became a station a pastor has been annually assigned to it by the African Methodist Church. The salary of the pastor thus assigned was paid by the Bethel Church.

The master states in his report that "There was no evidence introduced before me to warrant the conclusion that Bethel Church had ever been dedicated as a church of the African Methodist Episcopal connection, nor that any formal union between the said two churches ever existed. The evidence tended to show that there never was any dedication of said Bethel Church, nor any formal union with the said African Methodist Episcopal Church."

It appears that in 1904 the Bethel Church thought its building inadequate for its needs, and raised \$409.08 for the construction of a new church building. They applied to the African Methodist Church for aid, without success. They then opened negotiations with the Methodist Church, looking towards severing their connections with the African Methodist Church and taking on ecclesiastical connections with the Methodist Church, if the latter would give them the aid they wished. This the Methodist Church promised to do. Thereupon a special meeting of the Bethel Church was called for November 9, 1904, at which the offer of the Methodist Church was accepted. The membership of Bethel Church, on November 9, 1904, was thirty-five. How many were present at this meeting was not disclosed in the evidence. On December 7, 1904, twenty-eight members of the Bethel Church sent to one Jacobs, the presiding elder of the African Methodist Church, a withdrawal from that Church. Jacobs was the presiding elder "into whose official charge the said Bethel Church was given" by the African Methodist Church. On December 14 Jacobs came to Worcester and announced that he would preach on January 25, and would hold a meeting to investigate the withdrawal on Monday, January 26, 1905. The meeting was not held. "After Jan. 26, 1905, Dr. Jacobs, acting on the theory that the Rev. W. B.

Perry had resigned as pastor of said Bethel Church, and that the trustees duly elected in June or July, 1904, had also resigned by the effect of said letter and certificate, proceeded to assume the duties of pastor of said church, and also, about Feb. 1, 1905, proceeded as pastor to appoint three trustees of said Bethel Church, and appointed Reason T. Lee, James McKinney and Stephen Cook, named in the entitling clause of the plaintiffs' bill. After Jan. 26, 1905, Dr. Jacobs did not formally call any other meeting of the members of Bethel Church for any purpose." On or about February 1, 1905, "as a further step in carrying out the said agreement between" the Bethel Church and the Methodist Church, the members of the Bethel Church in a body and as a church were received into the Methodist Church, and on April 1, 1905, their pastor, Rev. W. B. Perry, was received into conference relations with the New York church. "Since April 1, 1905, said Bethel Church has been conducted by the said Perry, under the supervision of a presiding elder appointed by the New England conference of the Methodist Episcopal Church and in accordance with the discipline thereof, and has since ceased to have ecclesiastical or other relations with the said African Methodist Episcopal Church."

On March 9, 1905, the present bill was filed by the three persons appointed by Dr. Jacobs as trustees after January 26, 1905, against the Methodist Church corporation and Albert A. Nunally and two others who, in December, 1904, were the trustees of the Bethel Church, and who had undertaken to convey the land and church building as trustees of the "Bethel African Methodist Episcopal Church" to themselves as "trustees of the Bethel Methodist Episcopal Church." It does not appear that Jackson and the other grantees in the deed of April 14, 1892, ever conveyed the premises therein described to Nunally and his associates or any one else. The prayer of the bill was for an injunction restraining the defendants from preventing the plaintiffs from enjoying the use of the land and church building in question; that Nunally and his associates be directed to convey the land and church building to the plaintiffs and deliver up to them the \$409.08 raised for building a new church. The conclusion of the master was that the bill should be dismissed.

The case was recommitted to the master. On the second

hearing conflicting evidence was offered by the plaintiffs, for the purpose of showing that it was the intention of the grantor in the deed to Jackson and others to convey the property to the trustees in a trust capacity and not in their individual capacity. This evidence was heard *de bene* and finally excluded by the master. No exception was taken to the master's report by reason of this ruling.

*J. L. Mitchell* (of Rhode Island), for the plaintiffs.

*J. K. Greene*, for the defendants.

LORING, J. [After the foregoing statement of the case.] Neither counsel dealt specifically with the several exceptions. We shall deal with the case accordingly.

The plaintiffs' contention here is that "The defendants having severed their membership with Bethel A. M. E. Church, a religious society, forfeited their rights to its property." In support of this contention their counsel has cited among other cases *Shannon v. Frost*, 3 B. Mon. 258; *Watson v. Jones*, 13 Wall. 679; *Bose v. Christ*, 193 Penn. St. 13; *Franke v. Mann*, 106 Wis. 118.

But the difficulty with that argument and those citations is that no facts like the facts on which those cases were decided are found by the master in the case at bar. The plaintiffs' counsel has assumed in his argument that the Bethel Church became a part of the African Methodist Church, and that by force of the "discipline" of that church its property became the property of that church. But on the findings of the master the Bethel Church did not become a part of the African Methodist Church, and we cannot say that its property would have become the property of the African Church by force of the "discipline" of that church if it had. For we have no means of knowing what the "discipline" so often referred to by counsel for the plaintiffs is. It is not made a part of the master's report, and the evidence before the master is not before us.

All that appears is that the land in question was conveyed to Jackson and others to their own use, and that the land and building were paid for by money raised and contributed by members of the Bethel Church. That church never has been dedicated as a church of the African Church, and no formal union between the Bethel Church and the African Church has ever existed.

Under these circumstances the only trust affecting the property in question was that which results from the payment of the money. Just what that trust would be need not be considered here. It is enough that on the facts before us it does not result in a trust subjecting the land to the ownership and control of the African Methodist Church.

On the findings of the master, which alone are before us, the plaintiffs have failed to show any right of property, possession or control of the land and building, or of the \$409.08.

No exception was taken to the master's report based on the exclusion of evidence by the master, and therefore that question is not before us. *Hillier v. Farrell*, 185 Mass. 484. Apart from that, the evidence excluded was immaterial. It is or may be important what trust should have been declared by the grantees, or what trust resulted from the payment of the money. What was the intention of the grantor is of no importance. Even if the deed had been a deed to Jackson and others as trustees, the title to the land and building would not have vested in Nunally and others by force of their appointment as trustees, although the parties in this case seem to have assumed that it would. The issue on which the excluded evidence was offered was, as we have said, on an immaterial point. In either event the legal title is in Jackson and his co-grantees and their heirs, or in the survivors or survivor of them.

*Decree affirmed.*

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MARY E. MORAN, administratrix, vs. MILFORD AND  
UXBRIDGE STREET RAILWAY COMPANY.

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

In an action against a street railway company under B. L. c. 111, § 267, for causing the death of the plaintiff's intestate, it appeared that the intestate was nearly seventy years of age, that at about half after ten o'clock in the evening he was seen standing at a corner of the street where the accident happened looking up and down the street, and next was seen going over the cross walk which led across the tracks, that he had crossed one track and had reached the

other when he was struck and killed by a car of the defendant. It was undisputed that at the corner where the accident occurred the number of travellers with teams at that time in the evening was so great as to require close observation to ascertain which way they were going. There was conflicting testimony on which it could have been found that the street was well lighted by an electric arc light and that on coming within one hundred and fifty feet of the place of the accident the motorman saw the intestate standing on the curbing at the corner and did not see him again until he was in front of the car, that the gong was not rung, that the rate of speed was at least ten miles an hour, and that if the motorman, instead of concentrating his attention upon the volume of public travel on the side of the street where the plaintiff's intestate was, had included in his general observation the entire area from curb to curb, and also had rung the gong seasonably, the accident might have been avoided. *Held*, that, assuming without deciding it, that there was evidence for the jury of due care on the part of the plaintiff's intestate, there was no evidence of negligence on the part of the defendant in employing or retaining the motorman as a servant, in the absence of proof of previous misconduct showing unfitness; and that, even if the acts and omissions of the motorman would have been evidence of negligence on his part in an action brought by the intestate had he survived, they were not evidence of gross negligence of a servant of the defendant within the meaning of the statute.

**BRALEY, J.** This is an action of tort brought under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate, who was killed by coming into collision with a car of the defendant on the evening of October 27, 1904, while as a traveller he was passing across its railway tracks located in Main Street in the town of Milford. In the Superior Court upon the close of the plaintiff's evidence, at the request of the defendant the presiding judge ordered a verdict in its favor, which having been returned, the plaintiff brings the case to this court on exceptions.

The intestate, who was nearly seventy years of age, at about half after ten o'clock in the evening was seen standing at the corner of the intersection of Central Street with Main Street, and after "looking up and down the street" was next observed going along the cross walk which led across the tracks. He had passed the easterly track and apparently had reached the westerly track, over which the defendant's car was approaching going south, when he was struck by the car and killed. It substantially could have been found that the street was well lighted by an electric arc light, and that upon coming within one hundred and fifty feet of the place of collision the motorman saw the intestate standing on the curbing at the corner, and did not



again see him until he was in front of the car. After its intersection with Main Street the continuation of Central Street was known as Exchange Street, and it was undisputed that the number of travellers with teams was so large at this point at that time in the evening as to require close observation to ascertain whether they were passing from Exchange Street into Main Street. It also appeared that because of a projecting building a full view of this corner could not be obtained until the car was nearly opposite. The motorman testified that, by reason of these conditions, although he rang the gong when he first saw the plaintiff's intestate, as the car approached he fixed his attention upon this portion of the street to avoid accidents, and did not observe him after he started to cross the tracks, but if he had noticed him on the crossing the car, which at this time was not being driven over four or five miles an hour, could have been stopped in time to prevent the accident. There was evidence, however, in conflict with parts of this statement by witnesses who were of opinion that the rate of speed was at least ten miles, while one witness in the immediate neighborhood who saw the car as it approached, and witnessed the collision, testified that he did not hear the gong sounded.

Assuming, without deciding, that there was evidence for the consideration of the jury of the due care of the decedent, the action cannot be maintained unless some proof is found either of the negligence of the defendant, or of the gross negligence of its servant, who at the time was in charge of the car. *Coleman v. Lowell, Lawrence & Haverhill Street Railway*, 181 Mass. 591. *McCrohan v. Davison*, 187 Mass. 466. *Hennessey v. Taylor*, 189 Mass. 583. *Spooner v. Old Colony Street Railway*, 190 Mass. 132. As neither the track nor the car and its equipment are shown to have been defective, a suggestion is offered that the motorman was incompetent to perform his duties. The only evidence of alleged incompetency to which the plaintiff refers is his conduct at the time of the accident in not continuously observing the intestate, and a failure to give any warning, or to apply more promptly the brake for the purpose of stopping the car. These acts, even if they could be characterized as contended, are not sufficient to charge the defendant with negligence in employing and retaining an unfit servant with-

out further proof of previous misconduct showing unfitness, which does not appear. *Olsen v. Andrews*, 168 Mass. 261, 265. Nor is there any evidence of gross negligence of the motorman.

The jury could have found from the conflicting testimony that the gong was not rung, and that the velocity exceeded the rate stated by the motorman, and that, if instead of concentrating his attention upon the volume of public travel on that side of the street the motorman in the exercise of ordinary care had included in his general observation the entire area from curb to curb and also had seasonably rung the gong, the accident might have been avoided. *Menard v. Boston & Maine Railroad*, 150 Mass. 386. *Brusseau v. New York, New Haven, & Hartford Railroad*, 187 Mass. 84. *Dalton v. New York, New Haven, & Hartford Railroad*, 184 Mass. 344. But if the rate of speed and these acts of omission could have been found sufficient to constitute negligence on the part of the defendant which would have sustained an action by the intestate if he had survived, they were not, even when combined, enough to establish such wanton and reckless conduct as to amount to gross negligence within the meaning of the statute as defined in recent cases. *Galbraith v. West End Street Railway*, 165 Mass. 572. *Banks v. Braman*, 188 Mass. 367. *Spooner v. Old Colony Street Railway*, 190 Mass. 182. *Dolphin v. Worcester Consolidated Street Railway*, 189 Mass. 270.

No error being found in the ruling the entry must be

*Exceptions overruled.*

*J. B. Ratigan, J. E. Swift & J. J. Moynihan, Jr.*, for the plaintiff.

*W. Williams, J. C. F. Wheelock & G. B. Williams*, for the defendant.

CHARLES W. HARRIS vs. FITCHBURG AND LEOMINSTER  
STREET RAILWAY COMPANY.

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Negligence.*

If the driver of a milk wagon coming from an intersecting street into a street on which electric cars are operated, while still on the intersecting street at the only point at which the other street is visible, looks and sees no car approaching and as he goes into the street on which the cars run looks again and sees no car, and driving slowly looks again when his horse gets upon the track and sees a car approaching, and urges his horse ahead thinking that he can get across the track in time, but the rear part of his wagon and one of its hind wheels are struck by the car, in an action against the street railway company operating the car for injuries to his person and property thus caused, there is evidence for the jury that he was in the exercise of due care.

TORT for injuries to the plaintiff's person and property from being run into by an electric car of the defendant while driving in a low covered milk wagon on West Street in Leominster at its intersection with School Street in that town at about eleven o'clock in the morning of September 9, 1900. Writ dated September 14, 1901.

In the Superior Court the case was tried before *Bond, J.* At the close of the evidence the defendant asked the judge to rule that upon all the evidence it did not appear that the plaintiff was in the exercise of due care. The judge refused to make this ruling; and submitted the case to the jury with instructions as to due care where vehicles meet on the highway, to which no exceptions were taken. The jury returned a verdict for the plaintiff in the sum of \$1,350; and the defendant alleged exceptions.

*C. F. Baker & W. P. Hall*, for the defendant.

*D. I. Walsh & T. L. Walsh*, for the plaintiff.

MORTON, J. This case comes here on exceptions by the defendant to the refusal of the judge to rule that on all of the evidence the plaintiff was not in the exercise of due care. That is the only question presented by the bill of exceptions.

The plaintiff testified, amongst other things, that as he came down School Street he looked up West Street at the only place where he could look over the Pierce estate and saw no car approaching; that as he went into West Street he looked again and saw no car; that he was driving slowly; and that when the horse got on to the track he looked again and then saw the car approaching and urged the horse ahead thinking that he could get across the track and did so, with the exception of the rear part of the wagon and the hind wheel which were struck by the car. He further testified that as he came down School Street into West Street he listened and heard no sound or warning of an approaching car. This testimony if believed would warrant a finding that he was in the exercise of due care. The distance at which a car could be seen or ought to have been seen on West Street from School Street was a circumstance to be taken into account and given such weight as the jury thought the fact as they found it justly entitled to. It is to be assumed that proper instructions were given as to what would and would not constitute due care on the part of the plaintiff. We think that it could not be ruled as matter of law that the plaintiff was not in the exercise of due care, and that the instruction requested was rightly refused. See *Orth v. Boston Elevated Railway*, 188 Mass. 427; *McCarthy v. Boston Elevated Railway*, 187 Mass. 493; *Evensen v. Lexington & Boston Street Railway*, 187 Mass. 77; *Kelly v. Wakefield & Stoneham Street Railway*, 179 Mass. 542; *Lahti v. Fitchburg & Leominster Street Railway*, 172 Mass. 147; *Driscoll v. West End Street Railway*, 159 Mass. 142.

*Exceptions overruled.*

**ELLA L. PUTNAM vs. ARTHUR T. HARRIS & another.**

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence. Fire. Practice, Civil, Conduct of trial, Exceptions. Evidence, Declarations of deceased persons.*

In an action for negligently causing the burning over of a woodlot of the plaintiff, where the presiding judge under R. L. c. 175, § 66, admits the declarations of a deceased employee of the defendant that he sent other employees of the defendant to clear certain land and that in doing so they had started a fire and it had got away from them, which is competent evidence against the defendant if the declarant had authority to give the order, and, on objection of the defendant, the judge says that he admits the evidence *de bene* leaving the plaintiff to show the authority later, and afterwards the defendant does not bring the matter to the attention of the judge either by a request to strike out the evidence admitted *de bene* or by a request for a ruling that there is no evidence for the jury on the question of the authority of the declarant, the defendant can have no ground for exception to the admission of the declarations whether there was evidence of authority or not.

On the argument of an exception to the admission of the declarations of a deceased person under R. L. c. 175, § 66, the excepting party cannot raise the objection that the declarations stated matters not within the personal knowledge of the declarant, if the question to the witness did not call for facts beyond the knowledge of the declarant and no motion was made to strike out the answer on this ground.

An exception to the admission of evidence cannot be sustained on the ground that a witness or declarant stated a matter not within his personal knowledge, if the matter thus stated otherwise appears in the bill of exceptions to have been the fact, so that the admission of the evidence could have done the excepting party no harm.

TORT for alleged negligence in causing the burning over of a woodlot of the plaintiff in Templeton. Writ dated August 8, 1905.

In the Superior Court the case was tried before *Pierce, J.* The following facts were stated in the bill of exceptions :

On the day of the fire, April 28, 1903, the plaintiff was the owner of a tract of land in Templeton of about one hundred acres which was covered in the most part by a growth of young pine, spruce, maple and other varieties of wood. The fire burned over a greater portion of this lot.

The defendants operated a mill in the village of Baldwinville in Templeton for the manufacture of tubs, pails and other wooden-ware. They employed about one hundred men in their factory, from time to time had from ten to fifteen teams working for them, and at times had from twenty-four to thirty men cutting timber on their woodlots in Templeton and other towns. They were the owners of a large tract of woodland about three miles from their factory which had been cut off. A small portion of this land next to an old road was mowing land, and was known as the Crow Hill lot. On the morning of the fire two of the defendants' employees named Rush and Collins set fire to two piles of brush gathered by them on this mowing land, and this fire spread and burned over a large tract of land. A fairly brisk wind was blowing at the time toward the southwest, a direction away from the plaintiff's land which was about two thousand feet from where the fire started.

Testimony of various witnesses and a plan used at the trial showed that between the place where the fire started and the nearest portion of the plaintiff's land there was situated the mowing land, on the line of which was a stone wall, a road, a large tract of land called the Whitney or E. Murdock and Company land, which had years before been cut off and burned over, and a swamp and cranberry bog from one hundred to five hundred feet wide, with a long narrow pond in the centre thereof formed by the spreading out of a brook.

The testimony was conflicting as to whether the fire which started on the defendants' land spread to the plaintiff's land and caused the damage alleged.

The defendants had in their employ one McNaughton, who died about a month before the bringing of this action, and Rush and Collins before mentioned. The occupation of Rush and Collins was driving teams, but at different times during their employment they had cut logs, wood and hay, and had done ploughing for the defendants. On the morning of the fire Rush and Collins came to the defendants' factory to begin work. There McNaughton, in the absence of the defendants, told Rush to go up to the Crow Hill lot and go to ploughing, and that there were some pine tops, and to pick them up and burn them out of the way and keep on ploughing, and said he wanted

the piece sowed to rye. They set a fire to burn the brush gathered on this land and it got away from them and spread to other land. Being unable to check the fire, Collins went to the factory for help, and McNaughton and other of the defendants' men came to this lot to assist in putting out the fire.

On the question of the agency of McNaughton, there was testimony by the defendants that McNaughton was a general all-round man; that he worked around the factory; that he looked after the logs as they came into the yard, measured them, looked after and ran the saw mill and the sawing the logs into boards and sticking them up; that he looked after the piling up of the staves; looked after the horses and doctored them when sick; that he did not pay off the men and did not discharge or hire them except under the directions of one Murphy; that whatever he did was under Murphy's instructions; that he received his orders entirely from Murphy, and that nothing was left in his charge except under the supervision and looking after it by Murphy; that he never acted in the capacity of foreman, and did not have charge of the teamsters nor the work outside of the factory; that they had no superintendent or foreman, but the business was run by the defendants; that in the absence of Murphy, one Harris looked after the business, and *vice versa*; that there were no directions given to any of the men to burn or destroy by fire any combustibles or refuse on the Crow Hill lot, and they had no knowledge that McNaughton was going to give any directions to any one to clear this land, or that Rush and Collins were going to do any work on this land until some time after the fire had started; that about two weeks before the day of the fire, Murphy had told McNaughton that he, Murphy, was going to plough the land and sow it to rye some time when they were easy with the teams.

There was testimony by witnesses for the plaintiff that before the fire they had heard McNaughton direct the drawing of some gravel and the ploughing of some land back of the shop, and had heard him send choppers to woodlots to make roads; that McNaughton had taken care of the horses in the barn; had worked around the saw mill and had worked around the factory like any of the workmen; that at different times when parties desired to have timber sawed by the defendants they were referred to

McNaughton to do the work, and that they had paid McNaughton for timber bought; that he hired and discharged men.

The plaintiff offered the testimony of Frank L. Putnam, the plaintiff's son, to a conversation between him and McNaughton on the evening of the fire, which was objected to by the defendants and was admitted by the judge against the exception of the defendants.

The manner in which this testimony was admitted and also the admission of the testimony of Rush as to a conversation with McNaughton are stated in the opinion. The manner in which the question of McNaughton's agency was left to the jury is stated in the opinion in a quotation from the bill of exceptions.

The jury returned a verdict for the plaintiff in the sum of \$577.54; and the defendants alleged exceptions.

*G. R. Warfield*, for the defendants.

*J. P. Carney*, for the plaintiff.

LOBING, J. This is an action for negligence against the defendants in setting a fire on their own land, which got beyond control, ran over an intervening lot, and damaged the trees on the plaintiff's premises.

As one step in proving that the fire was set by direction of the defendants the plaintiff offered to prove by one Putnam the statement of one McNaughton. It appeared that McNaughton died before the action now before us was brought. To the introduction of this evidence the defendants objected. The presiding judge ruled that the admissibility of the testimony depended "upon whether or not the questions could have been put to him or his testimony could have been shown if he were alive." The defendants again objected and the judge said: "This is admitted *de bene*, — the authority he is going to show later." Thereupon the witness testified that McNaughton stated in answer to a question as to the origin of the fire, that he had sent men from the defendants' factory to clear the defendants' land to sow rye, and in clearing the land they had started a fire and it had got away from them. Another witness, Rush by name, one of the two men sent by McNaughton, was allowed to testify against the objection and exception of the defendants that McNaughton told him to go to plough the field of the defendants in question, and added that there were some pine tops there which he told



Rush and the other employee to pick up "and burn them out of your way."

It is plain that the testimony was admitted under R. L. c. 175, § 66, and was competent against the defendants if it was shown that McNaughton had authority from them to give the directions in question. Whether evidence of the directions given should be admitted first and the authority shown later, or the evidence of the directions given should be excluded until McNaughton's authority was shown, was a matter to be decided by the presiding judge in his discretion.

It heretofore has been generally laid down that in such a case the exception will not be sustained unless it appears from the bill of exceptions that the evidence was not properly connected. *Whitcher v. McLaughlin*, 115 Mass. 167. *Costello v. Crowell*, 183 Mass. 352, where the earlier cases are collected.

It is more correct to say that the exception will not be sustained unless the fact that the evidence admitted *de bene* had not been properly connected afterwards was brought to the attention of the judge and a further ruling on that ground asked for. The rule was so laid down in *Brady v. Finn*, 162 Mass. 260. See also *Williams v. Clarke*, 182 Mass. 316.

But whichever is the true statement of the rule, the exception in question must be overruled.

The matter was not subsequently brought to the attention of the judge either by a request to strike out the evidence admitted *de bene*, or by a request for a ruling that there was no evidence for the jury on this point.

It is stated in the beginning of the bill of exceptions that "the evidence material to the issues raised was as follows." Whatever might be thought to be the true construction of this bill of exceptions if this statement stood alone, it is plain from the concluding statement of the bill that the defendants did not raise the question of the sufficiency of McNaughton's authority. The concluding statement is as follows: "The question of McNaughton's agency and authority to direct men to set fire to the brush on the lot was submitted to the jury under proper instructions and not excepted to by either party."

The defendants now further object that McNaughton could not have testified to the facts stated by him because they were

not within his personal knowledge. The question asked did not call for facts not within his knowledge, and no motion was made to strike out the answer on that ground. The objection cannot now be raised. See *Packer v. Thomson-Houston Electric Co.* 175 Mass. 496; *McInnis v. Boston Elevated Railway*, 190 Mass. 386. Apart from that it appears that McNaughton went to the fire after it started, and therefore the only fact testified to by him of which he could not be found by the judge to have had personal knowledge was the fact that the fire was set by Rush and the other employee. That is stated in the bill of exceptions to have been the fact, and therefore the defendants were not injured by the introduction of that evidence. In such a case the exception will not be sustained. *Hinckley v. Somerset*, 145 Mass. 326.

*Exceptions overruled.*

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BERNARD J. BURNS, JR. vs. WORCESTER CONSOLIDATED  
STREET RAILWAY COMPANY.

BERNARD J. BURNS vs. SAME.

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

In an action against a street railway company by a boy eight years of age when injured, for personal injuries from being run into by a car of the defendant while crossing a highway, there was evidence that the plaintiff to reach his destination was obliged to cross the street in question on which were tracks of the defendant where cars frequently were passing, and that the plaintiff with knowledge of these conditions, seeing a car slowly moving past, waited between the sidewalk and this car until it had passed, and then, after listening and not hearing a bell, which he had observed always was rung when a car passed this point, and, seeing no car except at some distance to the south, started to cross over, that, upon reaching the middle of the track used by cars going north, he saw a car coming, and, jumping back to avoid it, was struck by the under side of the running board and thrown under the wheels of the rear truck. It also could have been found that other travellers were passing over the street at the time that the plaintiff attempted to cross. Held, that there was evidence for the jury that the plaintiff was in the exercise of the degree of care which under like conditions would be exercised by an ordinarily prudent child of his age.

In an action against a street railway company by a boy eight years of age when

injured, for personal injuries from being run into by a car of the defendant while crossing a highway, if it appears that a rule of the defendant required the gong to be rung at all street crossings and at all points where vehicles or foot passengers were crossing or ordinarily would be likely to cross the tracks, and that this signal was not given by the motorman and had it been given would have prevented the accident, and if there also is evidence from which it could be found that the motorman failed to observe the plaintiff who was in front of the car near the middle of the track, and that had he used reasonable diligence he would have seen him and could have prevented the accident by applying at once the emergency brake, there is evidence to go to the jury of negligence on the part of the defendant.

TWO ACTIONS OF TORT, the first by a boy eight years of age when injured for personal injuries from being run into by a car of the defendant while crossing Main Street in Worcester, and the second by the father of the plaintiff in the first case for loss occasioned by the injuries to his son. Writs dated November 26, 1904.

In the Superior Court the cases were tried together before *Pierce, J.* At the close of the evidence, which is described sufficiently in the opinion, the defendant asked the judge to rule that upon the evidence the plaintiffs could not recover, and that in each case the verdict must be for the defendant. The judge refused to rule as requested, and submitted the cases to the jury.

The judge in his charge left it to the jury to say whether or not upon the evidence the car which the infant plaintiff saw "way down there opposite a store" could have been the car that struck him.

The jury returned a verdict for the plaintiffs, in the first case in the sum of \$5,416, and in the second case in the sum of \$1,150. The defendant alleged exceptions in both cases.

*C. C. Milton*, for the defendant.

*W. Thayer*, for the plaintiffs.

*BRALEY, J.* Unless the jury should have been instructed that as matter of law either the infant plaintiff was careless, or that there was no evidence of the defendant's negligence, the verdicts in favor of his father and of himself must stand. In lawfully using the public ways concurrently with the defendant, the infant plaintiff as a traveller was required to exercise only such degree of care as under like conditions would have been exercised by the ordinarily prudent child of his years. *McDer-*

*mott v. Boston Elevated Railway*, 184 Mass. 126. *Young v. Small*, 188 Mass. 4, 5. *Slattery v. Lawrence Ice Co.* 190 Mass. 79. *Sullivan v. Boston Elevated Railway*, 192 Mass. 87. At the time of the accident he was about eight years of age, and while on his way to the common was obliged to cross Main Street which ran north and south. In this street were located tracks of the defendant over which cars were frequently passing, and with knowledge of these conditions, seeing a car slowly moving past, the plaintiff waited between this car and the sidewalk until it had passed, and then, after listening and not hearing any bell, which from his former observation was always rung when a car passed this point, or seeing any car except at some distance to the south, started to cross over. Upon reaching the middle of the track used by cars going north, he saw a car coming, and jumping back to avoid it, was struck by the under side of the running board, and thrown under the wheels of the rear truck. It is plain, if this part of his narrative was believed, that while the plaintiff's view of the tracks from where he stood was unobstructed, there was no attempt to take the risk of getting over safely in front of an oncoming car moving at a high rate of speed as was the fact in *Murphy v. Boston Elevated Railway*, 188 Mass. 8, 9, 10. Instead he listened for the ringing of the bell, and not hearing this warning, nor seeing any car except at a distance, he proceeded to cross the street. If from his evidence the inference could have been drawn that he was struck by this car as the defendant contends, instead of by another car as contended by him, such an inference was a question of fact to be determined by the jury. But, if this contention was found to be sustained, this fact would not have been conclusive of his right to recover, for at most, even if he had been an adult, it would have been evidence to be considered as bearing on the degree of care which he should have used. *Silva v. Boston Elevated Railway*, 183 Mass. 249. It also could have been found that the plaintiff's conduct might have been influenced by the further fact that other travellers were passing over at the time, and using such judgment as boys of his age ordinarily possess he considered it prudent to follow. *Aiken v. Holyoke Street Railway*, 180 Mass. 8. *McDermott v. Boston Elevated Railway*, 184 Mass. 126. *Hennessey v. Taylor*, 189

Mass. 583. Under suitable instructions, which presumably were given as no exceptions were taken to the charge, upon all the evidence the question of the due care of the plaintiff was for the jury to determine. *Howland v. Union Street Railway*, 150 Mass. 86. *Rosenberg v. West End Street Railway*, 168 Mass. 561. *McNeil v. Boston Ice Co.* 173 Mass. 570, 577. *O'Brien v. Hudner*, 182 Mass. 381.

The evidence as to the position of the plaintiff immediately before he was injured was conflicting. According to the testimony introduced by the defendant he ran directly back of the car which was going south, and at once came into contact about midway of its length with the car coming from the south and going north. But according to the evidence of the plaintiff, who was corroborated by other witnesses, he did not cross until after the car going south had passed, and when he first saw the car that struck him he had reached the middle of the easterly track, about ten feet in front of the car, which was moving at a speed not exceeding four miles an hour. It was undisputed that notwithstanding a rule of the company requiring the gong to be rung at all street crossings, and at all points where vehicles or foot passengers were crossing or ordinarily would be likely to cross the tracks, this signal was not given by the motorman, and that if the emergency brake had been applied the car could have been stopped within a distance of from three to five feet. The jury were not bound to adopt the defendant's theory of the accident, or to accept the evidence of its witnesses. If they believed the plaintiff's statement as being a true version of his conduct, and of the management of the car by the defendant's servant, they could find that the motorman not only neglected to give the required warning, but failed to observe the plaintiff, who was in front of the car near the middle of the track, and that if he had used reasonable diligence he would have seen him, and observing his peril at once should have applied the emergency brake, and that if this precaution had been taken or the gong rung the accident would have been avoided. *Stevens v. Boston Elevated Railway*, 184 Mass. 476, 479. These inferences were questions of fact solely for their consideration. *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574. *Driscoll v. West End Street Railway*, 159 Mass. 142, 147. *Aiken*

v. *Holyoke Street Railway*, *ubi supra*. *Doyle v. West End Street Railway*, 161 Mass. 533. *Stevens v. Boston Elevated Railway*, *ubi supra*.

*Exceptions overruled.*

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GERMANIA FIRE INSURANCE COMPANY vs. HERMANN F. A.  
LANGE.

Worcester. October 2, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Evidence, Extrinsic affecting writings. Surety. Bond.*

In an action by an insurance company against the surety on the bond of an agent of the plaintiff given for the faithful performance of his duties, where the defence is that the defendant was discharged from further liability by a change in the contract under which the agent was employed made without the knowledge of the defendant, and where the contract is not described fully in the bond, it is competent for the defendant to prove by oral evidence the terms of the contract between the plaintiff and its agent to show the nature and extent of the defendant's liability.

A surety on a bond is discharged from further liability by a substantial change in the conditions to which the bond relates made without his knowledge and consent.

In an action by an insurance company against the surety on the bond of an agent of the plaintiff for a certain city given for the faithful performance of his duties, it appeared that when the bond was given the agent was employed by the plaintiff at a fixed annual salary of \$1,800, the plaintiff paying the office expenses and brokers' commissions which amounted to about \$2,100 a year, and that nearly nine years after the bond was given a new arrangement was made between the plaintiff and its agent without the knowledge of the defendant, whereby the agent instead of receiving a fixed salary was to be paid a certain commission on all business transacted by him in behalf of the plaintiff and was to pay all the expenses of the business in the city where he was agent including advertising and the salaries of sub-agents, and also became responsible to the plaintiff for all premiums due on policies written by him or his sub-agents and not returned by him to the plaintiff for cancellation. In other respects his duties were the same as when he received a fixed salary. If he did as much business under the new arrangement as under the old it would yield him a greater compensation. *Held*, that there had been a substantial change in the contract to which the bond related and that the defendant was discharged from liability for any breaches of the bond that occurred after the change was made.

CONTRACT by an insurance company against one of the sureties upon a bond dated January 7, 1898, given to the plaintiff by one William G. Lichtenfels and conditioned upon the faithful

performance of his duties as agent of the plaintiff for the city of Worcester. Writ dated April 21, 1904.

In the Superior Court the case was submitted to *Stevens, J.* upon an agreed statement of facts. He found and gave judgment for the defendant; and the plaintiff appealed, raising the questions stated in the opinion, where also the material facts sufficiently appear.

*B. W. Potter, (P. Potter with him,)* for the plaintiff.

*W. Thayer,* for the defendant.

KNOWLTON, C. J. The defendant signed a bond as surety for the faithful performance of his duties by one Lichtenfels, as an agent of the plaintiff company for Worcester. If the bond is applicable to the conditions arising after the change hereinafter stated, there has been a breach of its condition.

At the time of its execution Lichtenfels was employed by the plaintiff as its agent, at a fixed salary of \$1,800 per year, the plaintiff paying the office expenses and brokers' commissions, amounting in the aggregate to about \$2,100 per annum. Nearly nine years after the bond was given a new arrangement was made between the plaintiff and this agent, without the knowledge of the defendant, whereby the agent was to receive, instead of a fixed salary, a stated commission on all business transacted by him in behalf of the company, and was to pay all the expenses of the business in Worcester, which included the rent, heating and lighting of the office, the advertising and the salaries of sub-agents. He also became responsible to the company for all premiums due on policies written by him or his sub-agents and not returned by him to the company for cancellation. In other particulars his duties were substantially the same as those he was performing while receiving a salary. If he did as much business under the new arrangement as under the old, it would yield him a greater compensation than his former salary. The defendant had no knowledge of this change in the arrangement until after the death of Lichtenfels. The only question in the case is whether this change in the contract between the plaintiff and the agent discharged the defendant from liability for the agent's subsequent defaults.

The bond contains no description of the contract between the plaintiff and Lichtenfels, beyond the statement that he had been

appointed agent for this insurance company for Worcester. But in the condition of the bond many of his duties are mentioned, and the defendant also was told by the parties what the contract was. If he had not been expressly informed of this, he would have been presumed to have contracted in reference to the actual conditions, and to have known what they were, so far as they bore upon the liability assumed. It was therefore competent to prove by oral evidence the terms of the contract between the plaintiff and the agent, to show the nature and extent of the defendant's liability. *Rollstone National Bank v. Carleton*, 136 Mass. 226. *Grocers' Bank v. Kingman*, 16 Gray, 473. *Boston Hat Manufactory v. Messinger*, 2 Pick. 223.

The general rule is familiar, that a substantial change in the conditions to which such a bond relates, made without the knowledge and consent of the surety, discharges him from further liability. *Warren v. Lyons*, 152 Mass. 310, 312. *Grocers' Bank v. Kingman*, 16 Gray, 473. *Northwestern Railway v. Whinray*, 10 Exch. 77. *Boston Hat Manufactory v. Messinger*, 2 Pick. 223. In *Warren v. Lyons* Mr. Justice William Allen reviewed the authorities, and said in the opinion: "The question here is not merely whether the creditor has done some act which impairs the security or enhances the risk of the guarantor; but it relates to the subject matter of the guaranty, — whether the contract broken is the contract the performance of which is guaranteed. The guarantor cannot be held to a contract different from the terms of his guaranty, even though it be apparently more beneficial to him."

In the present case the question is whether there was a substantial change in the contract to which the bond relates. It seems to us very plain that there was. The case of *Northwestern Railway v. Whinray*, 10 Exch. 77, which has been cited and followed in this court, was very similar to this, and fully covers it.

The decision in *Amicable Ins. Co. v. Sedgwick*, 110 Mass. 163, was by only a majority of the court, and the change in the contract was much less than the change in the present case, as is pointed out in the opinion. That decision does not sustain the present plaintiff's contention.

*Judgment for the defendant.*



## EDWIN J. PICKWICK vs. FRANCIS A. McCAULIFF.

Worcester. October 3, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, &amp; BRALEY, JJ.

*Negligence. Joint Tortfeasors. Release. Commonwealth.*

If a civil engineer employed by the metropolitan water and sewerage commissioners, who is in charge of the work growing out of the construction of the Wachusett reservoir and whose duty it is to inspect all the work as it progresses, in the course of the performance of his duties is present, sitting with a masonry inspector on a derrick boom lying near and instructing the inspector in regard to the way in which his work is to be done, while the servants of one who has a contract with the Commonwealth for the construction of a masonry arch bridge over the Nashua River are engaged in erecting a derrick as a preliminary to the construction of the arch, and owing to the negligence of the servants of the contractor is struck and injured by the foot of the mast of the derrick swinging out as it is being hoisted into place, in an action against the contractor for his injuries, it cannot be ruled as matter of law that he was a mere volunteer or licensee or that he was not in the exercise of due care or assumed the risk of such an accident.

If a civil engineer, employed by a board of commissioners to take charge of and inspect certain work in behalf of the Commonwealth, while acting in the course of his duties is injured through the negligence of the servants of a contractor who has a contract with the Commonwealth for a part of the work of which he is in charge, and signs a paper agreeing in consideration of receiving his pay while absent from duty and being indemnified for hospital expenses and doctors' bills to make no claim upon the Commonwealth for the injury, this instrument has no effect to bar an action against the contractor for his injuries.

In order that the release of one of several joint tortfeasors shall discharge the others the person released must be capable of being sued for the joint liability.

The principle, that the release of one of several joint tortfeasors operates as a bar to a recovery against the others, has no application where the party released is the Commonwealth which cannot be sued as a tortfeasor.

TORT for personal injuries sustained on July 26, 1904, at West Boylston while the plaintiff was at work as a civil engineer and inspector for the metropolitan water and sewerage commissioners of the Commonwealth. Writ dated January 14, 1905.

At the trial in the Superior Court before *Bell, J.* the following facts appeared in evidence:

Before the accident the defendant had been awarded a contract which provided for the construction of a masonry arch

bridge over the Nashua River near the village of West Boylston. The plaintiff was the resident engineer in charge of this and all other work at West Boylston growing out of the construction of the Wachusett reservoir, and it was his duty to inspect all the work as it progressed, and to inspect and approve the materials used. As a preliminary to the construction of the masonry work of the stone arch provided for in the contract it became necessary for the defendant to erect a derrick near the point where the arch was to stand, and the injury to the plaintiff occurred while the derrick mast was being put in position by the employees of the defendant.

During the forenoon of the day of the accident the plaintiff, in the performance of his duties, had been inspecting the work in neighboring localities. His first work in the afternoon was to go with one McCauliff, the nephew and representative of the defendant, to show him where suitable sand and gravel might be had, the inspection of sand and gravel being one of the plaintiff's duties under the contract. The plaintiff then returned with McCauliff to the vicinity of the arch, and there met one Allen, a masonry inspector in the employ of the metropolitan water and sewerage board, and began telling him where suitable sand and gravel could be secured. While the plaintiff and Allen were talking, McCauliff left them and went to the point where the employees of the defendant were engaged in putting up the derrick, and shortly after went to the place where the hoisting engine had been placed. The work of putting up the derrick was in charge of one Goodrhue, a foreman in the defendant's employ. The plaintiff and Allen first stood at a distance of about one hundred and fifty feet from the point where the defendant's employees were engaged in putting up the derrick. The mast of the derrick, to the top of which five guy ropes were attached but which was not secured at the bottom, had been raised by means of another derrick standing near by until the foot of the mast dropped into the socket of the foot block, but in such a way that the mast listed slightly from the vertical position. After the mast had been raised to the position described above, the plaintiff and Allen approached somewhat nearer, the plaintiff still explaining to Allen what was to be done and the directions he had just given to McCauliff with reference to sand and gravel.

The plaintiff testified that after talking with Allen his next duty was to inspect the work being performed by three laborers of the Commonwealth who were engaged in preparing the foundation for the bridge at a distance of some twenty-five or thirty feet from the hoisting engine and that after he and Allen had walked a short distance toward the bridge they sat down on the westerly end of the derrick boom, sixty-nine feet long, which was lying near by and was supported by timbers. This boom was about fifteen or eighteen feet away from the foot block, and it was about twenty-five feet from the foot block to where the Commonwealth laborers were working. While the plaintiff and Allen were sitting on the boom and discussing the way in which the work was to be done, the defendant's foreman, Goodrhue, gave the order "Just take a strain; raise it a little — just an inch," and immediately thereafter the mast was raised clear of the foot block and swung toward where Allen and the plaintiff were sitting. Allen ran in one direction and the plaintiff in another. It all happened in an instant, and the plaintiff only had time to jump over the boom and take about two steps when the mast of the derrick struck the boom, knocking him down and breaking his leg.

The plaintiff testified that he was somewhat familiar with the raising of derricks and knew that it was a little dangerous, but that he thought that this derrick mast was substantially in place when he took his position on the boom, although he saw the defendant's servants prying the foot block. The only warning given was by the words "Just take a strain; raise it a little — just an inch," and these statements were made immediately one after another.

Derrick experts testified that "Give it a strain" had a particular meaning among men familiar with the operation of derricks, and that it meant just to tighten the ropes, to put the power of the hoister through the ropes so as to relieve the pressure, and that it did not mean to lift the mast entirely out of the foot block, as was done in this case.

While the plaintiff was in the hospital, where he went immediately after his injury, he signed at the request of his superior officer, Charles E. Wells, the department engineer for the metropolitan water and sewerage board, who explained to him that it

was simply a matter of form and something the Commonwealth required from its employees whenever and however they were injured, the following paper:

“Metropolitan Water and Sewerage Board.

“Reservoir Department.

“Clinton, September 21, 1904.

“To whom it may Concern:—

“In consideration of receiving my pay while absent from duty on account of injury received while working at West Boylston Arch, and of being indemnified for necessary hospital expenses or doctor’s bills,—

“I hereby agree to make no claim against the Commonwealth of Massachusetts on account of said injury.

“Edwin T. Pickwick.

“Witness Charles E. Wells.”

At the close of the evidence the defendant asked the judge to rule as follows:

1. That the plaintiff was not entitled to recover.
2. That there was not sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care.
3. That there was not sufficient evidence to warrant the jury in finding that the plaintiff did not assume the risk of an injury occurring under the circumstances disclosed.
4. That upon all the evidence the plaintiff must be held to have assumed the risk of an injury occurring as this did.
5. That upon all the evidence the plaintiff must be held to be a volunteer, and the only duty which the defendant owed him was not to be grossly and wantonly negligent.
6. That the instrument signed by the plaintiff bars him from recovery.

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,290. The defendant alleged exceptions.

*J. R. Thayer, H. H. Thayer & J. H. McMahon*, for the defendant.

*R. A. Stewart, F. H. Nash & H. J. Hart*, for the plaintiff.

MORTON, J. This is an action of tort for personal injuries sustained by the plaintiff on July 26, 1904, at West Boylston

while at work as a civil engineer and inspector for the metropolitan water and sewerage board. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain instructions that were requested. The instructions requested were in substance that on all the evidence the plaintiff could not recover, that he was not in the exercise of due care, that he assumed the risk, that he was a mere volunteer or licensee, and that a certain release given by the plaintiff to the Commonwealth operated as a bar to his recovery in this action.

Without reviewing it in detail we think that there was evidence of negligence on the part of the defendant. There was testimony tending to show that there should have been guys on the bottom of the derrick or that it should have been steadied by hand, and the jury were warranted in finding, if they did so find, that the accident was due to failure on the part of those in charge of the work of setting up the derrick to use one or the other of these precautions. The jury might also have found that there was negligence on the part of the engineer in regard to the manner in which he operated the engine. One witness testified that he, the engineer, "opened the throttle of the engine; he gave it a yank; didn't intend to pull it out so far; . . . if just a strain had been taken, no trouble would have happened. An excessive yank caused the trouble."

It could not be ruled as matter of law that the plaintiff was a mere volunteer or licensee, or that he was not in the exercise of due care, or that he assumed the risk. The defendant concedes that the plaintiff rightfully entered on the premises where the defendant's men were setting up the derrick. If the jury believed the plaintiff, as they must have done, he was there in the performance of duties required of him by the nature of his employment under the contract between the defendant and the Commonwealth, and therefore was not a volunteer or licensee. And the jury properly could have found, and no doubt did find, that in sitting down on the boom, as he and Allen did, the plaintiff had no reason to apprehend any danger from the derrick, and therefore was not wanting in the exercise of due care, and did not assume the risk of the accident which occurred. *Mahar v. Steuer*, 170 Mass. 454. *McMahon v. McHale*, 174 Mass. 320.

The remaining question relates to the effect of the paper signed by the plaintiff agreeing, in consideration of receiving his pay while absent from duty and being indemnified for hospital expenses and doctors' bills, to make no claim upon the Commonwealth for the injury. We assume in favor of the defendant that the paper, though not under seal, operated as a release of any claim which the plaintiff had against the Commonwealth. It is well settled that a release of one of several joint tortfeasors will operate as a bar to a recovery against the others. But in order to have that effect we think that the party to whom the release is given must be one against whom an action would or might lie, and that a claim has been made for or on account of the alleged tort. It is not necessary that it should appear that he was in fact liable (*Leddy v. Barney*, 189 Mass. 394), or that there should have been concert of action amongst the alleged joint tortfeasors. *Stone v. Dickinson*, 5 Allen, 29. A gift from one of the joint tortfeasors will not operate to bar a recovery against the others. *Leddy v. Barney*, *supra*. There must be something in the nature of a claim on the one hand, and of possible liability under the rules of law applicable to the matter on the other, in order to render the release a bar to recovery against other joint tortfeasors. In the present case no action could have been maintained against the Commonwealth for the alleged injury. *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28. It was not legally answerable in tort to the plaintiff or to any one, and besides, no claim was made by the plaintiff against the Commonwealth. What was received by the plaintiff from the Commonwealth must be regarded therefore as in the nature of a gift or gratuity, and not as something paid in satisfaction of an injury for which it was or might be liable according to established rules of law, or of a claim made upon it by the plaintiff.

*Exceptions overruled.*

**ELLEN McCARTY vs. CLINTON GAS LIGHT COMPANY.**

Worcester. October 8, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, & BRALEY, JJ.

*Negligence. Evidence, Presumptions and burden of proof.*

To sustain an action under R. L. c. 106, § 73, by the widow of an employee against his employer for causing the instantaneous death of her husband, the plaintiff must show affirmatively that her husband at the time of the accident causing his death was in the exercise of due care, and if there is an entire absence of evidence as to what he was doing when the accident happened a verdict must be ordered for the defendant.

TORT under R. L. c. 106, § 73, by the widow of Jeremiah McCarty, an engineer employed by the defendant, to recover for his instantaneous death alleged to have been caused by the defective condition of the engine and floors of the defendant's electric light works at Clinton by reason of the negligence of some person in the employ of the defendant charged with the duty of seeing that the engine and floors were in proper condition. Writ dated October 29, 1904.

At the trial in the Superior Court before *Pierce, J.* the judge at the close of the evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*J. R. Thayer, H. H. Thayer & A. T. Saunders*, for the plaintiff.

*H. Parker, C. C. Milton & G. A. Gaskill*, for the defendant.

KNOWLTON, C. J. It is unnecessary to consider other parts of this case, for there is nothing to show that the plaintiff's husband, at the time of the accident, was in the exercise of due care. He was found dead on the floor of the engine room, in the passageway between the rapidly revolving fly wheel and the wall of the building. He was the engineer in charge of the engine, and no one else was present at the time of the accident. The top of his skull was cut off, and it seems likely that this was done by the fly wheel or some of its attachments. If it is possible that the accident happened while the deceased was in the exercise of due care, it is equally possible and more probable

that his negligence was one of the causes, if not the sole cause, of his death. In *Tyndale v. Old Colony Railroad*, 156 Mass. 508, this court said: "Where there is an entire absence of evidence as to what the person killed was doing at the time of the accident, it is not enough to show that one conjecture is more probable than another. There must be some evidence to show that he was in the exercise of due care." Similar language is used in *Gleason v. Worcester Consolidated Street Railway*, 184 Mass. 290. See also *Shea v. Boston & Maine Railroad*, 154 Mass. 31; *Cox v. South Shore & Boston Street Railway*, 182 Mass. 497, 499; *Irwin v. Alley*, 158 Mass. 249; *Felt v. Boston & Maine Railroad*, 161 Mass. 811; *Mathes v. Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416; *Murphy v. Boston & Albany Railroad*, 167 Mass. 64.

*Exceptions overruled.*

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JOHN D. BIGGERT vs. CHARLES L. STRAUB & others.

Worcester. October 3, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Jurisdiction.* *Equity Jurisdiction*, To reach and apply equitable assets. *Insurance, Life.*

A liability of a Massachusetts corporation upon a policy of life insurance held by a citizen and resident of another State and in the possession of a pledgee in this Commonwealth is such property within this Commonwealth as gives jurisdiction to proceed *in rem* against it without personal service on the holder of the policy.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply in payment of a debt due to the plaintiff equitable assets of the defendant debtor within this Commonwealth, it appeared that a Massachusetts corporation had issued a policy of insurance on the life of the defendant debtor in the sum of \$10,000 for a term of thirty-two years, promising to pay that sum to him or his assigns at the end of that period or in the event of his death before that time to pay it to his wife, that this policy had a cash surrender value of more than \$3,000 and was in the possession of the defendant insurance company to which it had been delivered by the defendant debtor as security for an advance to him of about \$1,200. *Held*, that the interest of the defendant debtor in the policy contingent on his survival of his wife was an equitable asset whose value could be ascertained by sale or by some other means within the ordinary procedure of the court and which therefore could be reached and applied under the statute.



BILL IN EQUITY, filed January 26 and amended May 31, 1906, against Charles L. Straub and Bertha G. Straub, his wife, both of Pittsburgh in the State of Pennsylvania and temporarily residing at Brooklyn in the State of New York, and the State Mutual Life Assurance Company, a corporation organized under the laws of this Commonwealth and having its usual place of business at Worcester in this Commonwealth, under R. L. c. 159, § 3, cl. 7, to ascertain and determine the indebtedness of the defendants Straub to the plaintiff and to reach and apply to the payment of such indebtedness a certain policy of insurance issued by the defendant corporation upon the life of the defendant Charles L. Straub.

The defendants Charles L. Straub and Bertha G. Straub were not served personally with notice of the suit either within or without the Commonwealth. There was service by publication by order of the court. These defendants appeared specially and moved to dismiss the bill. There was service on the defendant corporation, and a temporary injunction was issued which was served upon that defendant, enjoining it from paying over the cash surrender value of the policy in question to the defendants Straub.

In the Superior Court the motions to dismiss were denied by *Gaskill, J.*, and the defendants Straub appealed. The judge, being of opinion that it was proper for the question as to jurisdiction raised by the motions to dismiss to be determined by this court before any further proceedings in the Superior Court, reported the case for such determination. If the motions should have been allowed, the bill was to be dismissed or such other disposition was to be made of it as might seem just. If the motions should have been denied, the defendants were to be allowed to answer and the case was to stand for hearing in the Superior Court.

*C. T. Tatman*, for the defendants Straub.

*A. T. Johnson, A. H. Bullock & J. M. Thayer*, for the plaintiff.

KNOWLTON, C. J. This is a suit in equity in the nature of an equitable trustee process, brought under the R. L. c. 159, § 3, cl. 7, to reach and apply in payment of a debt due, the plaintiff's property in the hands of the defendant life insurance company, belonging to the debtor, Charles L. Straub. This defendant and

his wife, Bertha G. Straub, the other defendant, who seems to have an interest in the property, are not residents of this Commonwealth and the only service made upon either of them was by publication. They have filed motions to dismiss the suit for want of jurisdiction. The presiding judge overruled these motions and then reported for consideration by this court the questions arising upon them.

The first question is whether a liability of a Massachusetts corporation upon a policy of life insurance held by a citizen and resident of another State is property within this Commonwealth, such as to give jurisdiction to the court here to enter a decree in the nature of a judgment *in rem* against it. This question is precisely the same, in its legal aspect, as the question whether such a liability, in a form that can be reached by trustee process in an action at law, gives jurisdiction for an action of the latter kind. This question has long been treated in this Commonwealth as requiring an affirmative answer. *Ocean Ins. Co. v. Portsmouth Marine Railway*, 3 Met. 420. *Whipple v. Robbins*, 97 Mass. 107. *American Bank v. Rollins*, 99 Mass. 318. *National Bank of Commerce v. Huntington*, 129 Mass. 444. *Garity v. Gigie*, 130 Mass. 184. In view of conflicting cases in different jurisdictions, it was considered at some length and decided in the affirmative in *Rothschild v. Knight*, 176 Mass. 48, and it was settled by decisions in the Supreme Court of the United States, which is the final arbiter in all controversies as to the validity and effect of judgments of one State in the courts of another State. *Chicago, Rock Island & Pacific Railway v. Sturm*, 174 U. S. 710, 716. *King v. Cross*, 175 U. S. 896, 899. *Rothschild v. Knight*, 184 U. S. 334. *Blackstone v. Miller*, 188 U. S. 189, 205, 206. The defendants' objection to the jurisdiction on this ground is not sustained.

The only other question is whether the property is of such a nature as to come within the statute. The State Mutual Life Assurance Company issued a policy of insurance on the life of the defendant, Charles L. Straub, in the sum of \$10,000, for the term of thirty-two years from May 7, 1895, promising to pay this amount to him or his assigns on May 7, 1927, or, in the event of his death before that date, to pay it to his wife, the defendant Bertha G. Straub. It appears that this policy now has a cash

surrender value of more than \$3,000. It further appears that the policy is in the possession of the insurance company, which has a lien upon it for \$1,281 advanced to the defendant Charles L. Straub.

The policy is not before us, and the only knowledge we have of its terms or provisions is derived from the averments in the stating part of the bill. Nor do we know whether the proceedings that have been had, or the assignment to the insurance company which we infer has been made as security for the advance of money, are such as leave the defendant Bertha G. Straub without further interest in the policy. From the averments of the bill the debtor, Charles L. Straub, appears to have, at the least, an interest in the policy whose value depends in great measure upon the contingency of his survival of his wife. If he has no greater interest, this question arises: Whether, in view of this contingency, the value of his interest "can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court." See R. L. c. 159, § 3, cl. 7. On this question the case of *Alexander v. McPeck*, 189 Mass. 84, 44, is decisive. It was there held that a right whose value depended on a similar contingency could be reached under this statute, and that, for the purposes of the statute, the value could be ascertained by sale, or some other means within the ordinary procedure of the court.

*Motions disallowed.*

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FRANK H. HOLLAND, executor, vs. FRANK H. BALL, administrator *de bonis non* with the will annexed & another.

Worcester. October 3, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Executor and Administrator. Conversion. Equity Pleading and Practice, Appeal.*

A transfer by an executor to himself of shares of stock belonging to his testator unexplained is in itself a wrongful conversion. In the present case there was an express statement in the account of an executrix of an appropriation and conversion to her own use of property of her testator which included the shares in question.

On an appeal to this court from the decree of a single justice an agreement of counsel, that the copy of a certain will printed in the Massachusetts Reports in

the report of another case between the same parties may be referred to, has no effect upon the record before this court, which includes only those matters that were before the single justice when he made the decree.

APPEAL from the decree of a single justice affirming a decree of the Probate Court for the county of Worcester disallowing certain items in the first and final account of Hannah A. Holland, executrix of the will of Henry Holland, filed by Frank H. Holland, executor of the will of Hannah A. Holland.

The account in question under Schedule B, "Showing payments, charges, losses and distributions," contained the following item :

"And accountant further says that he has found no estate standing in the name of Henry Holland in the hands or possession of his testatrix, Hannah A. Holland, but that under the will of Henry Holland she has spent of the principal and income for her use and support, and the accountant does not know in what sums, and has appropriated and converted to her own use all the remainder of the estate of Henry Holland so that no part of said estate of Henry Holland has come into his hands or possession by virtue of his being the executor of the will of Hannah A. Holland, amounting to \$7,628.33."

In the Probate Court *Forbes, J.* in passing upon this account made the following decree :

"It is decreed that said account as amended be allowed with the following modifications, viz. :

"All items in the amendment to said account are disallowed except that the said executrix is allowed for her services the sum of two hundred dollars, and the last item of Schedule B, viz. : \$7,628.33, is disallowed and leaving in the hands of said executrix in personal property at its appraised value, and cash the sum of \$7,428.33. Schedule C, showing property of the estate in the hands of the executrix at the time of her death, should be stated as follows :

Furniture,	\$16 00
Promissory note,	200 00
75 shares of American Bank Note Co.,	8,750 00
Deposit in Worcester Co. Inst. for Savings,	1,600 00
Cash,	1,862 33
Total,	\$7,428 33 "

Frank H. Holland, executor, appealed. On appeal the case was heard by *Braley, J.*, who made a decree that the decree of the Probate Court be affirmed and that the case be remitted to the Probate Court for further proceedings. Frank H. Holland, executor, appealed to the full court.

The following statement of facts agreed upon was signed by the counsel for the respective parties:

"Hannah A. Holland died on April 8, 1903; Frank H. Holland, her executor, in May, 1905, sold seventy-five shares of the American Bank Note Company, of the par value of \$50 a share, then standing in the name of Hannah A. Holland and originally in the name of Henry Holland, and being a part of his estate received by her, for the sum of \$5,887.10 and deposited the proceeds thereof, viz., said sum of \$5,887.10, in the Quinsigamond National Bank of Worcester, and later in the Worcester Trust Company as a separate and distinct fund."

The statement in the brief for the appellant in regard to the will of Henry Holland, which is referred to in the opinion as not bringing that will before this court, was as follows:

"Henry Holland by will, a copy of which appears in the case of *Ball v. Holland*, 189 Mass. 369, and which counsel agree may be referred to, gave to his widow, Hannah A. Holland, the right to use for her support and the support and education of his minor children the principal of his property, and bequeathed the income thereof to her absolutely."

*A. M. Taft & J. B. Scott*, for the appellant.

*H. L. Parker*, for the administrator *de bonis non* with the will annexed of the estate of Henry Holland.

*W. Thayer & H. W. Cobb*, for Charles E. Holland.

LOBING, J. The only question of law presented here is whether an executor acquires title to shares of stock belonging to the estate of his testator by wrongfully transferring them into his own name.

It is elementary law that an owner does not lose his property in a chattel by a wrongful conversion of it by another. The owner may at his election hold the wrongdoer for damages or retake the chattel owned by him. This is plainly stated in *Glaspy v. Cabot*, 135 Mass. 435, cited by the appellant together with *Choate v. Arrington*, 116 Mass. 552, and *King v. Ham*,

6 Allen, 298. There is nothing in any of these cases which supports the appellant's contention.

There is no ground for the argument that the executrix bought the stock in question of herself. The transfer to herself unexplained is of itself a wrongful conversion. But the fact is put beyond a doubt by the statement in the account that the executrix "appropriated and converted to her own use all the remainder of the estate" not spent by her. It is apparent from the statement of the items in the decree of the Probate Court making up the \$7,628.33 in question that this covers the shares of stock here in question. We do not mean to intimate that if she had undertaken to buy the stock of herself the sale could not have been avoided.

What remedy or remedies the administrator *de bonis non* may have, based on the subsequent sale by the executor of the executrix or otherwise, is not now before us. See in this connection *Sewall v. Patch*, 132 Mass. 326. All that we now are called upon to decide and do decide is that the shares of stock in question were the property of the estate of Henry Holland at the date of the decease of his widow, the executrix of his will.

The statement in the brief for the appellant that the will of Henry Holland which appears in *Ball v. Holland*, 189 Mass. 369, may be referred to cannot be entertained by the court. A case not passed upon by the single justice who entered the decree appealed from cannot be substituted by agreement of counsel. The question before us is the correctness of the decree of the single justice. *Robinson v. Brown*, 182 Mass. 266.

In our opinion the appeal is frivolous, and the entry must be

*Decree affirmed, with double costs.*

**AUGUSTUS DANIELS vs. HENRY A. CLARKE & trustees.**

Worcester. October 3, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Attachment, By supplementary process. Trustee Process. Jurisdiction.*

No attachment by special precept under R. L. c. 167, § 80, can be made by trustee process unless one of the persons summoned as trustees dwells or has his usual place of business in the county where the action is pending, as required by R. L. c. 189, § 2.

RUGG, J. This is an action of contract commenced in the Superior Court for the county of Worcester. The plaintiff is described as of Southbridge in the county of Worcester, and the defendant as of Boston in the county of Suffolk. While the action was pending the plaintiff filed a motion, representing that no attachment was made of property of the defendant upon the original writ, and alleging that there were funds due to the defendant from S. D. Loring of Newton, in the county of Middlesex, and Homer Loring of Brookline, in the county of Norfolk, doing business as S. D. Loring and Son at Boston, in the county of Suffolk. Upon this motion a special precept issued, directing the attachment of funds in the hands of S. D. Loring and Son by trustee process. Within the time allowed for appearance to the special precept, said Lorings appeared, and moved to dismiss the special precept, on the ground that neither of the trustees lived or had his usual place of business in Worcester county. Upon this motion judgment was rendered for the trustees against the plaintiff, from which the plaintiff appealed.

The special precept was issued by virtue of the authority conferred by R. L. c. 167, § 80, which, so far as material to this case, provides that "At any time during the pendency of an action, . . . upon the commencement of which an arrest or attachment is authorized by law, the court . . . may . . . order such arrest of the defendant or such attachment of his property by the trustee process or otherwise to secure the judgment . . . which the plaintiff may obtain in said cause. . . . Such . . .

attachment shall be subject to all the provisions of law relative to . . . attachment upon mesne process, so far as applicable." This language plainly permits an attachment to be made during the pendency of an action only of a like kind as the law authorized to be made at its commencement. The word "such" wherever it occurs in this section can have no force or effect unless it refers to the "arrest or attachment" first mentioned in the same section; and the scope of the words as there used is clearly limited to what the law authorized at the "commencement" of the action. But the only attachment by trustee process, which can legally be made at the commencement of an action in the Superior Court, is upon a writ returnable in the county where one or all of the trustees dwell or have their usual place of business. R. L. c. 189, § 2. It is contrary to the letter, as well as the spirit of the statute, to permit a court to obtain jurisdiction of parties in trustee process under the mask of a special precept, which it cannot acquire directly at the time the action is instituted. As the supplementary process in this action was not returnable in a county in which either or both of the trustees dwelt or had his usual place of business, the motion to dismiss was well founded. *Hooper v. Jellison*, 22 Pick. 250. *Lewis v. Denney*, 4 Cush. 588.

*Judgment affirmed.*

*J. M. Cochran*, for the plaintiff.

*J. Bennett*, for the trustees.

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JACOB JACOBSON vs. MILTON M. FAVOR.

Worcester. October 3, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence, Employer's liability. Evidence, Inference of fact.*

In an action by a painter against a contractor employing him, for personal injuries from a fall caused by the breaking of a ladder used as a staging, it is not evidence of negligence on the part of the defendant, that the defendant's superintendent in charge of the work left the plaintiff and two of his fellow workmen, of an average weight of one hundred and sixty pounds each, to paint a house



using as a staging an extension ladder, which was safe for such use when not extended, without telling the plaintiff, who was a painter of twenty years' experience and was conversant with the use of extension ladders as stagings, that it would be dangerous to extend the ladder so as to make it six feet longer if all three of the men were to use it as a staging at the same time.

In an action by a painter against a contractor employing him, for personal injuries from a fall caused by the breaking of an extension ladder used as a staging, where it appeared that the accident would not have happened if the ladder had not been extended when used as a staging by three heavy men at the same time, the plaintiff had testified "We had used this ladder painting on other jobs in this same way," and his counsel argued that from this statement the jury could have inferred that the same three men had used the ladder extended and that this was known by the defendant. *Held*, that from the statement as an isolated piece of evidence the jury would not be warranted in drawing those inferences; and moreover an examination of the evidence showed that the statement referred merely to the use of the ladder as a staging and not to its use as such a staging by three heavy men when it had been drawn out.

TORT by a painter against a contractor and builder erecting a house on Logan Street in the town of Gardner for personal injuries received on August 13, 1903, from a fall caused by the breaking of a ladder used as a staging, with a count under the employer's liability act alleging negligence on the part of one Jeremiah O'Brien as superintendent of the defendant, and with other counts at common law alleging negligence of the defendant in furnishing an improper and defective staging, and in failing to maintain the ladder used as a staging in a safe and proper condition. Writ dated November 4, 1903.

At the trial in the Superior Court before *Pierce, J.* it appeared that on the day of the accident the plaintiff with two other workmen was employed under the direction of O'Brien in painting a barn and house, that O'Brien helped the three men to rig the staging on the barn, which consisted of the extension ladder doubled up suspended from the roof by two ropes. On the ladder was a long board on which to place the pots of paint. Having rigged the staging, O'Brien told the three men to paint the barn which was about twenty-four feet wide, and went away. The plaintiff painted in the middle and the other two painters at either end. Having painted the barn with one drop of the ladder the men, without the assistance of O'Brien, proceeded to rig the ladder in the same way on one end of the house, also about twenty-four feet wide. O'Brien came by and examined the hooks to see that they were properly fastened to the roof

and proceeded to another job. Having finished this end of the house with one drop of the doubled up ladder, the three men proceeded to move the staging to the back of the house, which was wider, being twenty-eight feet wide. They decided to paint the back with one drop, and in order to do this extended the ladder by pulling it out. O'Brien was not there at the time. The plaintiff was painting in the middle, and according to his testimony the other two men "were right near the ropes." Suddenly the ladder gave way and the plaintiff fell and was injured.

A part of the plaintiff's testimony was as follows: "There were three men on the ladder when we painted the barn, and also when we painted the house. We had painted the four sides of the barn and had painted one end of the house and were painting the back of the house when the ladder broke. There were three men on the ladder. I worked in the middle and a man on either side. The ladder was rigged in the same way when it broke as it was when we were painting before on the house and barn, except that the side of the house where we were painting when the ladder broke was wider, and the ladder had to be pulled out more. When we began to paint the house, O'Brien was there and helped to tie the ropes, and he said when we finished painting that end, we could move onto the side of the house and paint, but O'Brien was not there when the ladder was put on the side where it broke, and took no part in putting up the staging at the place where it fell, because he had gone away, as soon as we began to paint the end of the house. We had used this ladder painting on other jobs in this same way. When the ladder is pulled way out, it is thirty-four feet long, and when it is not it is twenty feet long. It was stretched out to a length of twenty-six feet so that the ends of the ladder overlapped each other, when we were painting on the side of the house when it broke. The ropes were attached to the ladder about three or four feet from either end."

Other material facts, including the previous experience of the plaintiff and the weight of the three painters on the ladder, are stated in the opinion.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence in the case the plaintiff was not

entitled to recover, and that the verdict must be for the defendant. The judge refused to rule as requested, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$3,000; and the defendant alleged exceptions.

*C. C. Milton*, for the defendant.

*C. H. Blood*, for the plaintiff.

LOBING, J. We do not find it necessary to consider whether one of the defences set up by the defendant is made out as matter of law, namely, that a stronger ladder or ladders were furnished by him and were accessible for use by the plaintiff, for we are of opinion that if the ladder in question had been the only ladder furnished there is no evidence that the defendant was negligent.

It is not pretended that the ladder made an insecure staging when used as it was used while O'Brien was present, that is to say, without its being extended at all. We say while O'Brien was present for we assume that he might have been found to be a superintendent so far as liability on that ground under the statute goes, and to be the person to whom the defendant left the matter of stagings so far as liability at common law and under the statute as to safe appliances and safe ways, works and machinery are concerned.

What caused the accident here complained of was drawing the ladder out to a length of twenty-six feet at least, and putting on it three painters, whose aggregate weight was assumed to have been four hundred and ninety pounds, in order to paint the side of the house in one "drop" in place of keeping the ladder doubled up, as it was when O'Brien was present, and painting the side of the house in two "drops."

The plaintiff, to use his own words, was a painter of twenty years' experience, who had painted on stages all that time, had constantly used stages of all kinds on the outside of buildings, and had used extension ladders "lots of times." The ladder was of spruce, with side pieces approximately two by three inches.

The case therefore comes to this: Was it negligence on the defendant's part to leave the plaintiff and his fellow workmen to paint the house with this ladder as a staging, without telling them not to extend the ladder if all three of them, with an

average weight of over one hundred and sixty pounds each were to use it as a staging? That it would be dangerous to do so is in our opinion a fact within the knowledge of a painter of twenty years' experience, who was conversant with the use of extension ladders as stagings.

The case belongs to the same class as *Arnold v. Eastman Freight Car Heater Co.* 176 Mass. 185. See also *Adasken v. Gilbert*, 165 Mass. 448; *McKay v. Hand*, 168 Mass. 270.

The plaintiff has asked us to hold that he had a right to go to the jury because in the course of his testimony he said "We had used this ladder painting on other jobs in this same way." His argument is that from this isolated statement the jury could have inferred that the same three men had used the ladder extended and that this was known by the defendant. We are of opinion that taken as an isolated piece of testimony the jury would not be warranted in drawing those inferences. Moreover, as the evidence went in, this statement is shown by the testimony preceding and following it to refer to the use of the ladder as a staging, not to its use as a staging when drawn out, with three men upon it weighing on an average one hundred and sixty pounds apiece. If the plaintiff intended to go to the jury on this theory he should have developed it more in evidence than he did by eliciting this statement in the connection in which it was given.

*Exceptions sustained.*

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## FREDERICK FORD vs. EASTERN BRIDGE AND STRUCTURAL COMPANY.

Worcester. October 3, 1906. — October 16, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, & BRALEY, JJ.

### *Negligence, Employer's liability.*

In an action by a workman in a factory for making bridge materials against his employer under R. L. c. 106, § 71, cl. I, for personal injuries from a defect in the ways, works or machinery of the defendant, there was evidence that the plaintiff was injured from being struck by heavy iron trusses which fell owing to the breaking of the chain by which they were being hoisted, that the link which broke was crystallized by reason of constant use, that the existence of crystallization cannot be determined on inspection even by an expert but that

it can be prevented by annealing, and that chains in constant use should be annealed every six months to prevent crystallization, that the chain which broke was lying on the floor and was used generally every day and was put around the trusses by a fellow workman of the plaintiff, that there were ten or twelve larger chains about the shop where the plaintiff and his fellow workman were at work, that if the chain used had had its apparent strength it would have been more than sufficient to bear the weight of the trusses but that owing to the crystallization of the link that broke it did not have one half of its apparent strength. *Held*, that the evidence warranted a finding that the furnishing of such a chain among others for use by the plaintiff was negligence on the part of the defendant, and that the fact that the defendant furnished a number of stronger chains did not help its case.

TORT, against a corporation engaged in the manufacture of bridge building materials and bridges, for personal injuries incurred on September 22, 1905, while in the defendant's employ from the breaking of a chain by which heavy iron trusses were being lifted, with three counts, the first at common law alleging negligence of the defendant in adopting and maintaining an insufficient chain as part of its apparatus, the second under the employers' liability act alleging negligence of a superintendent, and the third also under the employers' liability act alleging a defect in the ways, works or machinery of the defendant. Writ dated October 16, 1905.

At the trial in the Superior Court before *Maynard, J.* the defendant at the close of the evidence asked the judge, among other rulings, to rule that on all the evidence the plaintiff could not recover and the verdict must be for the defendant, and that the plaintiff could not recover on the third count of his declaration; that the chain as used was not part of the ways, works or machinery of the defendant. The judge refused to make these rulings. He ordered a verdict for the defendant on the first and second counts of the declaration and submitted the case to the jury on the third count.

The jury returned a verdict for the plaintiff on the third count in the sum of \$150; and the defendant alleged exceptions, which after the death of *Maynard, J.* were allowed under R. L. c. 173, § 108, by *Pierce, J.*

*H. Parker, C. C. Milton & D. F. Gay*, for the defendant.

*J. R. Thayer, H. H. Thayer & J. F. McGovern*, for the plaintiff.

LORING, J. In the case at bar the plaintiff was working for the defendant with one Damouchelle, a fellow servant. In order

to raise two iron trusses, Damouchelle took a chain lying on the floor and generally used every day, passed it around them, hooked on the fall and directed the plaintiff to pull on one end of the trusses as they were raised by the engine. When the trusses had been hoisted about a foot off the floor, one of the links of the chain broke and the end of the trusses struck the plaintiff, causing the injury here complained of. There was evidence that the link which broke was crystallized and that this crystallization was caused by constant use ; that a chain made up of links of the size of the link in question, not crystallized, would bear more than twenty-two hundred pounds, and only nine hundred to one thousand pounds when crystallized. The two trusses weighed from sixteen hundred to seventeen hundred pounds. It further appeared that the fact of crystallization cannot be determined on inspection even by an expert, but that it can be prevented by annealing the chains, and that chains in constant use should be annealed every six months, to prevent crystallization. It appeared that there were ten or twelve larger chains around the shop where Damouchelle and the plaintiff were at work.

There is no question of the right of the jury on this evidence to find that the chain in question had not been annealed within six months, that for that reason it had become crystallized, and being crystallized it broke and caused the accident. And further, that when crystallized it did not have half its apparent strength. To furnish such a chain among others for use is plainly negligence on the part of an employer.

The difference between the case at bar on the one hand and *Thyng v. Fitchburg Railroad*, 156 Mass. 13, and *Young v. Boston & Maine Railroad*, 168 Mass. 219, on the other hand is that in the latter two cases the condition of the pin was apparent on inspection. The defect in question in *Miller v. New York, New Haven, & Hartford Railroad*, 175 Mass. 363, was treated as a defect of the same kind. The negligence in the case at bar consists in furnishing a chain which through the defendant's negligence had not half its apparent strength. It does not help the defendant to show that it furnished a number of stronger chains. Had the chain in question had its apparent strength it would have carried the load.

*Exceptions overruled.*

**MARGARET ANDREWS vs. HELEN WILLIAMSON.****RUSSELL E. ANDREWS vs. SAME.**

Middlesex. January 18, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & SHELDON, JJ.

*Landlord and Tenant.*

If the outside steps of a house in the control of a landlord and used by a tenant appeared to be strong and safe at the time of the letting but contained a hidden defect, the landlord must do more than keep the steps in the condition in which they were at the time of the letting and must use due care to keep them as strong and safe as they then appeared to be, the tenant taking the risk only of obvious defects.

TWO ACTIONS OF TORT, one by Margaret Andrews to recover for injuries received by her on June 26, 1903, caused by her breaking through one of the steps of a house owned by the defendant in Everett; and the second by Russell E. Andrews, the husband of Margaret, for expenses and loss of her society caused by the injuries. Writs dated November 16, 1903.

On February 28, 1904, the defendant died and the administrator of her estate filed a suggestion of death and came in to defend the action.

In the Superior Court the cases were tried together before Bond, J. The facts which were admitted or which could have been found upon the evidence are stated in the opinion.

At the close of the plaintiffs' evidence the defendant rested and asked the judge to order a verdict for the defendant. The judge refused to do so, and the defendant excepted.

The defendant then requested in each case the following instructions to the jury:

1. There was no sufficient evidence to warrant a verdict for the plaintiff.

2. In order to recover the plaintiff must prove that the steps have become defective since the tenement was let to the tenant, Russell E. Andrews, and the defendant is not liable for an original defect in the steps.

8. There is no implied undertaking or duty on the landlord's part to make things better than they were.

The judge refused to give the instructions requested, and instructed the jury as reported in the bill of exceptions, the substance of the charge being stated in the last paragraph of the opinion.

The jury returned verdicts for the plaintiffs, in the first case in the sum of \$1,800, and in the second case in the sum of \$500. The defendant alleged exceptions to the refusal to give the rulings requested "and to such part of the charge as states that the landlord is liable if she ought to have known of the defect."

*C. W. Noyes*, (*J. R. Wellman* with him,) for the defendant.

*N. P. Brown*, (*E. L. Sweetser* with him,) for the plaintiffs.

HAMMOND, J. These two actions were tried together. At the trial it was admitted that the defendant was the owner of the premises where the accident occurred, and that at the time of the accident the relation of landlord and tenant existed between the defendant and the plaintiff Russell E. Andrews. The evidence was undisputed that the plaintiffs began to occupy the premises in February, 1902, and had continued such occupation up to the time of the accident which occurred in June, 1903; that the building "was a double tenement house with an upper and a lower flat," the plaintiffs occupying the lower flat and one Davis occupying the upper flat; that there was a front entrance to the house and a side entrance; that at the side entrance there was a flight of five steps used in common by both tenants; and that these steps were out of doors, being the means of entrance to the side door. The plaintiff Margaret, the wife of the plaintiff Russell, was injured by the breaking of one of these steps as she was passing over it.

At the trial it seems to have been assumed that the steps were not leased to either tenant, but were retained in the control of the defendant, and the arguments before us have proceeded upon the same assumption. The question therefore in substance may be stated thus: What is the nature of the duty owed by a landlord to a tenant as to the care and repair of a stairway over which the tenants have only a right of way in common, and which is kept within the control of the landlord?



In *Quinn v. Perham*, 151 Mass. 162, 163, the law on this subject is thus stated by C. Allen, J.: "The general rule, that a landlord does not by implication warrant the fitness for use of a demised tenement, is not applicable to a common passage owned by the landlord, by which several tenements demised by him are reached. *Watkins v. Goodall*, 138 Mass. 533. The landlord's duty in respect to such passage is that of due care to keep it in such condition as it was in, or purported to be in, at the time of the letting. But he is not bound to change the mode of construction. *Woods v. Naumkeag Steam Cotton Co.* 184 Mass. 357. *Lindsey v. Leighton*, 150 Mass. 285. "If the only access to demised tenements is by means of a ladder, or a rough unprotected staircase which is little better than a ladder, a tenant who enters into possession knowing the facts must be content to take the risk. So if the floor of a passage is laid only with loose boards, he cannot complain that it is not made fast and tight." The phrase "in such condition as it was in, or purported to be in, at the time of the letting" means such condition as it would appear to be to a person of ordinary observation, and has reference to the obvious condition of things existing at the time of the letting. In a word, the landlord is not obliged to change the visible form and mode of construction in order to make the place safe, nor is he bound to remove obvious sources of danger. As to these the tenant takes the risk. Stated in another way, the general duty is upon the landlord to use reasonable care to keep the stairway safe for his tenants, with the proviso that the tenant impliedly agrees that he will take the arrangement and mode of construction as they manifestly are, and will not call for any change to relieve from obvious dangers. Whatever may be the rule elsewhere, and notwithstanding some dicta in our reports seemingly to the contrary, such, we think, must be regarded as the law established by the decisions of this Commonwealth."

With this view of the law we proceed to the examination of the particular features of this case. The first request that there was no sufficient evidence to warrant a verdict for the plaintiff was rightly refused. Upon the evidence the jury could have found that the steps were apparently sound at the time of the letting, that the plaintiff was in the exercise of due care, and

that the defendant did not exercise due care to keep the steps in the condition in which they appeared to be at the time of the letting. The second and third requests also were properly refused. They did not properly state the law. The exceptions to the refusal to give these rulings are therefore untenable.

The record states that the defendant also excepted to "such part of the charge as states that the landlord is liable if she ought to have known of the defect." In considering this exception we have been somewhat embarrassed by the way in which the case comes to us. The whole charge covering four and a half printed pages is before us, and neither in the record nor in the brief of the defendant is there any specification of the precise words upon which the exception is based. The defendant however contends at the end of the brief that "the court, in its charge to the jury and in its refusal to give the instructions requested, substantially made the defendant landlord an insurer of her tenants against injury arising in any manner whatsoever from defects in common passageways, irrespective of their condition at the time of the letting."

We have examined the charge and do not find this criticism well founded. Taking the charge as a whole and the various sentences in their proper setting, and applying them to the particular facts of this case, the fair construction of it upon this point is that, if the defect of which the plaintiffs complain was obvious at the time of the letting, then the defendant was not liable; but that if the steps appeared strong and safe at the time of the letting then the defendant was bound to use due care to keep them in the condition in which they thus appeared to be. As thus construed the charge was apt and correct.

*Exceptions overruled.*

## MYSTIC S. GARDNER vs. CHARLES D. BUTLER &amp; others.

Berkshire. September 11, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, &amp; BRALEY, JJ.

*Evidence, Presumptions and burden of proof. Judgment, Entry of. District Court of Central Berkshire. Practice, Civil, Exceptions.*

The record of a district court imports verity and is presumed to be true until the contrary is shown.

On the issue whether in a previous action for liquidated damages a judgment upon a default had been entered in the District Court of Central Berkshire on a certain day, which was the Friday following the default, it was found by the trial judge in the Superior Court, that in the district court no specific order for judgment was made on the day in question, and that there was no evidence of any standing or general order of that court that judgment should be so entered except so far as such order might be inferred from the existence of "the custom [of that court] in a civil action for liquidated damages, where the defendant is defaulted for non-entry of an appearance, for the clerk of said court to assess the damages and enter judgment on the Friday following the day of default; and that it is the rule of said court that all such actions are ripe for judgment upon default." By St. 1869, c. 416, § 5, the standing justice of that court is given "power to make all proper rules for the conduct of the business of said court," but it did not appear that he had made any rule upon the subject. The judge of the Superior Court ruled that there was no rule of the district court requiring the entry of judgment upon a default at any particular time so imperative that in the absence of any record of a judgment such a judgment could be presumed. *Held*, that the ruling was right; that, whether or not the custom shown would support an entry of judgment appearing upon the record if it was disputed as entered without authority, it was not equivalent to such a direct unvarying order as to create an implication that a record showing no such entry of judgment was wrong.

The admission of evidence which in no way could have prejudiced the excepting party is no ground for exception.

BILL IN EQUITY, filed September 9, 1904, to restrain the defendants from selling on an execution issued in their favor against one Ernest Johnson certain real estate in Pittsfield to which the plaintiff claimed title.

At the trial in the Superior Court before *Harris, J.* the following facts appeared:

The defendants brought an action of contract for liquidated damages against Ernest Johnson in the District Court of Central Berkshire and attached the real estate in question, then

standing in Johnson's name. The writ in that action was returnable on February 27, 1904, and was duly entered. The defendant Johnson entered no appearance and on the following Tuesday, March 1, 1904, a default was entered. No judgment was entered until July 15, 1904, after the default had been taken off and the defendant had been defaulted again as stated in the opinion.

The execution issued on August 8, 1904, and on August 12, 1904, a levy was made on the real estate in question, which as above stated had been attached when the action was brought on February 27, 1904.

On June 2, 1904, Johnson gave the plaintiff a quitclaim deed of the real estate in question dated May 16, 1904. The consideration for this deed was money lent by the plaintiff to Johnson.

The plaintiff contended that under R. L. c. 167, § 55, and R. L. c. 193, § 20, the attachment of the real estate was dissolved because no execution was issued within thirty days after final judgment, and that the execution subsequently issued was not good against the plaintiff's deed.

The allegations of the bill relating to this contention were as follows:

1 "The plaintiff herein alleges that the defendant Johnson in said action in the District Court of Central Berkshire having been declared defaulted on March 1, 1904, and having from that day to March 4, 1904, at ten o'clock in the forenoon, said March 4 being the Friday of the week, taken no action in said case, said action was ripe for judgment on said last mentioned day and that the clerk of the said District Court of Central Berkshire ought according to law to have entered said judgment upon the declaration to wit upon the account annexed thereto, and costs of the suit. That the neglect of the clerk so to do did not invalidate the judgment or postpone its operation; that said judgment was in full force and effect from said day; that said judgment was never vacated; that it was a final judgment for the plaintiffs; that no action was taken and no execution was issued for thirty days after said final judgment; and that the attachment in said case was thereby dissolved. All of which was prior to the date of the deed of said Johnson to the plaintiff."

The evidence relied upon in support of these allegations is stated in the opinion, where also are stated the findings of fact made by the judge.

Upon these findings of fact the plaintiff asked the judge to rule as follows:

The defendant Johnson in *Butler et als. v. Johnson*, having been defaulted for non-appearance on March 1, it was the duty of the clerk, according to the standing order of the court, to assess the damages which were liquidated, and to enter judgment for the plaintiffs Butler at ten o'clock A. M. on March 4, and such judgment is deemed in law to have been entered on said March 4.

Under the rules of the District Court of Central Berkshire judgment for the plaintiffs Butler is deemed in law to have been rendered and entered on March 4, and no further action having been taken in the case for thirty days, the attachment was dissolved.

The case of *Butler et als. v. Johnson* being ripe for judgment on March 1 when the defendant was defaulted for not appearing, the clerk under R. L. c. 177, § 2, should have entered judgment on March 4, and such judgment is deemed in law to have been entered.

The judge refused to rule as requested, and ruled that there was no rule of the District Court of Central Berkshire requiring the entry of judgment upon default at any particular time and so imperative that in the absence of any record of a judgment a judgment could still be presumed. The plaintiff alleged exceptions.

The judge made a decree dismissing the bill with costs to the defendants. The record does not show that the plaintiff appealed.

*J. W. Lewis*, for the plaintiff.

*J. F. Noxon*, for the defendants.

HAMMOND, J. The writ upon which the attachment was made was returnable on February 27, 1904, and on that day was duly entered. The defendant Johnson made no appearance, and on March 1, 1904, a default was entered.

At the trial of the present case the plaintiff contended that the original action went to judgment on March 4, 1904, that

being the Friday next after the default. The record discloses no such judgment. On the contrary it shows that the default of March 1 was removed on April 11, in accordance with an agreement of the parties, and the defendant Johnson appeared; that on June 29 the plaintiffs Butler *et als.* filed a notice of an assignment for trial on July 9; that on the last mentioned day the defendant, not appearing, was again defaulted; that on July 15 judgment was entered on this last default; and that on August 8 of the same year the execution was issued. The record is simple and consistent with itself. No judgment was entered upon the first default.

The plaintiff in the present case contends, however, that even if no entry of judgment appears upon the record, still in law the case went to judgment on March 4, upon the first default, and the clerk should have made a record of it. The judgment, whenever made, must be by the order of the judge, and the duty of the clerk is simply to record this order. The trial judge found that no specific order for judgment was made on March 1 or March 4, 1904. Nor was there any evidence of any standing or general order of the district court that judgment should be so entered except so far as such order might be inferred from the existence of "the custom . . . [of that court] . . . in a civil action for liquidated damages, where the defendant is defaulted for non-entry of an appearance, for the clerk of said court to assess the damages and enter judgment on the Friday following the day of default; and that it is the rule of said court that all such actions are ripe for judgment upon default." This is far from a finding that the rule required judgment to be entered.

The judge ruled that there was no such rule of the court requiring the entry of judgment upon default at any particular time and so imperative that in the absence of any record of a judgment a judgment could still be presumed.

The ruling was right. The record imports verity. The standing justice of the district court has "power to make all proper rules for the conduct of the business of said court." St. 1869, c. 416, § 5.\* He does not appear to have made or pro-

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\* St. 1893, c. 396, § 59, incorporated in R. L. c. 160, § 45, was not mentioned in the record and was not referred to in the arguments or briefs.

mulgated any rule upon the subject, and no general imperative order as to the matter of judgment upon default for lack of appearance appears to have been in existence. Whether or not the custom shown would be strong enough to support an entry of judgment appearing upon the record in case of an attack upon it as entered without authority, it is certain that such a custom is not the equivalent of a direct, special, unvarying order, so far at least as to lead to the presumption that a record showing no judgment, or showing subsequent action of the court inconsistent with judgment, is wrong. The record still stands as importing verity, and in accordance therewith it must be held that the case did not go to judgment until July 15, 1904. The case widely differs from *Pierce v. Lamper*, 141 Mass. 20, and other similar cases upon which the plaintiff relies.

This view of the main contention of the plaintiff renders it unnecessary to consider the exception to the admission of the statement of Johnson that he had entered an appearance. Its admission in no way could have prejudiced the plaintiff.

*Exceptions overruled.*

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### ISAAC HORR vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Hampshire. September 18, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

*Nuisance. Negligence. Railroad.*

In an action against a railroad company for personal injuries caused by the horse of the plaintiff running away when frightened by a number of mail bags allowed by the defendant to lie on a pile of snow in the highway near the travelled path, there was evidence that the plaintiff was in the exercise of due care and that the horse he was driving was gentle and well broken, that the mail bags were placed on a pile of snow about six feet from the railroad tracks at a grade crossing of the highway and were three or four feet from the sleigh track or travelled path of the highway, that the accident happened about seven o'clock in the morning, that the mail bags had arrived at twenty-five minutes before that hour and were during that time, and thereafter until their delivery at the post office, in the custody and under the control of the defendant. Held, that there was evidence upon which a jury might find that the mail bags were piled

up in such a manner and in such proximity to the travelled part of the highway as to be likely to frighten horses, ordinarily gentle and well broken, while travelling upon the way, and thus to constitute a menace to public travel, and also might find that the defendant, knowing through its servants the position of the bags, negligently suffered them to lie there a longer time than reasonably was necessary and thereby to become a nuisance, and that the case should have been submitted to the jury.

TORT for personal injuries alleged to have been sustained while driving in a sleigh on Payson Avenue in Easthampton, by reason of the plaintiff's horse becoming frightened by a number of mail bags lying in that highway in the custody and control of the defendant, its agents and servants. Writ dated April 14, 1904.

At the trial in the Superior Court before *White, J.* the following facts were shown by the plaintiff's evidence:

Payson Avenue is a public way in the town of Easthampton and crosses at grade the tracks of the defendant. On the morning of January 25, 1904, the plaintiff with his daughter left home about twenty minutes before seven o'clock for the purpose of carrying his daughter to her work in the Glendale Mill in Easthampton. The plaintiff's house was from a mile and a quarter to a mile and three quarters from this crossing. Upon their way they picked up one Strangford, who seated himself on the right hand side of the sleigh, the daughter being upon the left and the plaintiff, who was driving, being seated between them. About seven o'clock, about ninety feet before reaching the crossing, the plaintiff drove across a spur track, the horse travelling at the rate of about six miles an hour. Near the gate tender's house there was a large bank of snow which appeared to have been thrown from the track and from the path leading from the gate tender's house to the tracks. The plaintiff was driving in an easterly direction and this pile of snow slanted in that direction. Lying upon the slanting or easterly side of this pile of snow, and within the limits of the highway, were a number of mail bags. These bags were not visible to a traveller on Payson Avenue travelling in an easterly direction until he was directly opposite them. When the sleigh reached the point where the mail bags lay, the horse snorted, leaped to one side and ran; the occupants of the sleigh were thrown out and the plaintiff was injured. It further appeared that the mail



bags arrived at twenty-five minutes before seven o'clock, and were in the highway at seven o'clock, and it was agreed that the bags were in the custody and under the control of the defendant during all that time and thereafter until delivered at the post office. It further appeared that the horse was a gentle, docile, safe mare, who had no bad habits, and that during all the time the plaintiff had possessed her she never before or afterwards had shied, plunged or run away, or ever had attempted to do any of these things.

The plaintiff was asked how far the bags were from the sleigh path, and said "I should judge from what I could see when I went by they were not more than three feet from the track." Strangford testified that "the mail bags were three or four feet from the sleigh path and five or six feet back from the railroad track." The plaintiff's daughter testified "The mail bags were about four feet from the sleigh track. The sleigh, when the mare lurched, was in the sleigh track."

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*E. L. Shaw*, for the plaintiff.

*J. C. Hammond*, for the defendant.

HAMMOND, J. Upon the evidence a jury might find that the mail bags were piled up in such a manner and in such proximity to the travelled part of the highway as to be likely to frighten horses, ordinarily gentle and well broken, while travelling upon the way, and thus to constitute a menace to public travel; and they might further find (although upon this point the case is close) that the defendant, knowing through its servants the nature of the obstruction, negligently suffered the bags to lie in that position a longer time than was reasonably necessary and that thereby the bags became a nuisance. There was also evidence of the due care of the plaintiff, and that the horse was ordinarily gentle and well broken. The case therefore should have been submitted to the jury. *Bemis v. Temple*, 162 Mass. 842, and cases therein cited. *Lynn v. Hooper*, 93 Maine, 46, and cases there cited.

At the argument before us it was stated by the counsel for the defendant that the place where the bags lay was also within the limits of the railroad location, but since that does not appear

on the record and the plaintiff did not agree that the case should be treated by us as though that statement were true, we have not considered what difference, if any, in the law of the case would be made by such a fact.

*Exceptions sustained.*

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FRANK BAGGNESKI vs. LYMAN MILLS.

Hampden. September 25, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Negligence, Employer's liability.*

If a boy fifteen years of age employed as a back boy in a cotton mill, whose duty it is to clean certain mules when stopped for the purpose, while proceeding to clean a mule which he is justified in believing has been stopped for the purpose of being cleaned, and having no reason to think that repairs are to be made upon the mule while he is cleaning it, is injured by the carriage of the mule being moved for such repairs, in an action against the proprietor of the mill for his injuries he can be found to have been in the exercise of due care.

If a superintendent in charge of a room in a cotton mill, having reason to know that a boy fifteen years of age is or may be at work back of a mule cleaning its weights and that the boy is justified in thinking that the mule has been stopped for the purpose of being cleaned, sends a workman to repair the mule without taking any steps to ascertain where the boy is and if necessary to give him notice in time to save himself when the mule is moved, and the workman in proceeding to make the repairs sets the carriage of the mule in motion and injures the boy, in an action by the boy against his employer for his injuries there is evidence of negligence on the part of the superintendent.

Under the provisions of the employers' liability act a workman by his contract of employment does not assume the risk of an accident caused by the negligence of a superintendent of his employer.

TORT for personal injuries while employed in the mule room of a cotton mill of the defendant at Holyoke, the third count of the plaintiff's amended declaration, upon which the case was submitted to the jury, alleging that the plaintiff was injured by reason of the negligence of some person in the service of the defendant entrusted with and exercising superintendence and whose sole or principal duty was that of superintendence, and the plaintiff's specifications filed with his amended declaration designating one L'Heureux as the person thus referred to as a superintendent. Writ dated March 17, 1904.

At the trial in the Superior Court before *De Courcy*, J. it appeared that the plaintiff was fifteen years of age on October 5, 1903, and that he was injured on January 16, 1904; that he had been in the defendant's employ about four months and before that never had worked in a mule room; that he was what was called a back boy and his duties were to put on roving, to sweep up, to put the tubes on the spindles and to clean the weights which were attached to and kept in position the small rollers under the roller beam of the mules; that on Saturday morning of each week at about half past seven o'clock it was customary to stop for an hour three pairs of mules for the purpose of cleaning the weights under the rollers; that these mules included the three on which the plaintiff worked; that the accident occurred on a Saturday morning when the three pairs of mules including those on which the plaintiff worked were stopped at the usual time in the customary way, and that the plaintiff was proceeding in the usual way to clean the weights; that after he had cleaned one mule, which took about twenty minutes, he went through the space or alley which ran between the carriage of that mule and the carriage of the mule that was next to it, which also was one of those on which he worked; that he went through this space or alley to the end of this next mule, which was ready for cleaning, the carriage being out nearly to its full distance, or out a good distance; that he saw no one working upon or about it; that the plaintiff went under the roller beam of this second mule and began at the end of it to clean its weights with a brush in the usual way, being on his knees with his face turned away from the centre or head of the mule; that, after he had cleaned the weights of the mule in this manner for a distance of four or five feet, the carriage was started and ran into the roller beam, and the first thing the plaintiff knew he was caught between the edge of the carriage and the roller beam and received the injuries sued for.

There was evidence that one L'Heureux was in charge of the room under one Burke, an overseer, who came there only about once a day; that L'Heureux was charged with the responsibility of looking after the operations and seeing that the work was done properly; and that he went around the room inspecting the work and hired and discharged the workmen; that L'Heureux sent a

messenger for one LaFleur, who was employed in another room, to repair the mule on which the plaintiff was injured; that the six mules were stopped at the time, and before the starting of the mule the plaintiff and one Sullivan, the other back boy, each had begun to clean his three mules of the six; that L'Heureux gave the plaintiff no notice or warning in regard to repairing the mule; and that LaFleur proceeded to set in motion the carriage which ran into the roller beam and injured the plaintiff.

At the close of the evidence the defendant requested the judge to rule that upon the pleadings, the notice and the whole evidence the plaintiff was not entitled to recover. The judge refused to give this ruling, either in form or substance, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$300. The defendant alleged exceptions.

*W. Hamilton, (W. H. Brooks with him,)* for the defendant.

*T. D. O'Brien,* for the plaintiff.

HAMMOND, J. While the evidence was conflicting and would have warranted a finding for the defendant on several matters essential to the maintenance of the plaintiff's case, still we cannot say as matter of law that it did not warrant findings that the plaintiff, being at the time of the accident in his sixteenth year, believed that the mule was stopped for the purpose of being cleaned, and was justified in that belief; that it was the plaintiff's duty then to clean it, and that in the performance of that duty he proceeded to clean it; that he did not know and had no reason to think that repairs were to be made upon the mule while he was cleaning it; and that while thus at work he exercised due care according to the lights he had.

The evidence further warranted findings that L'Heureux was a person whose principal duty was that of superintendence, (*Malcolm v. Fuller*, 152 Mass. 160; *Prendible v. Connecticut River Manuf. Co.* 160 Mass. 131; *Knight v. Overman Wheel Co.* 174 Mass. 455, and cases therein cited,) and that he was negligent in his duty to the plaintiff in permitting the carriage to be moved without taking some steps to ascertain where the plaintiff was and, if necessary, to give him notice in time to save himself. Such findings are sufficient to maintain the plaintiff's case.

The plaintiff under the statute upon which the third count is

based did not assume the risk of this carelessness of L'Heureux. "The risk which the workman assumes by virtue of his contract of employment does not include the risk arising from the negligent act of a superintendent." *Murphy v. City Coal Co.* 172 Mass. 324, 327, and cases cited.

*Exceptions overruled.*

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JOHN GALLUS vs. IRVING H. ELMER.

Hampden. September 25, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Sales of Merchandise in Bulk. Sale. Words, "Sale."*

A transfer by a dealer of the whole of his stock of merchandise outside his usual course of business in satisfaction of a pre-existing debt is a sale in bulk within the meaning of St. 1903, c. 415, making such a sale void as against creditors of the seller unless the requirements of that statute are complied with.

A sale of fixtures and tools is not a sale of a stock of merchandise within the meaning of St. 1903, c. 415, regulating sales of merchandise in bulk.

REPLEVIN against a deputy sheriff for personal property attached by the defendant as the property of one Kopec. Writ in the Police Court of Chicopee dated June 12, 1905.

On appeal to the Superior Court the case was submitted upon an agreed statement of facts to *Hitchcock, J.*, who found for the defendant. The plaintiff alleged exceptions.

The following facts were agreed with the stipulation that the court should have power to draw inferences from the facts stated:

The articles replevied were fixtures, tools and utensils and goods used in carrying on the butcher and grocery business at No. 67 Exchange Street in Chicopee. Their value was \$75.

On May 9, 1905, the plaintiff was conducting a butcher and grocery business at No. 67 Exchange Street, and on May 9 sold the articles mentioned in the writ of replevin, together with the stock of merchandise in the store, and executed and delivered a bill of sale therefor to one Karol Kopec, also of Chicopee, for the sum of \$550, of which \$100 was paid in cash and the bal-

ance was to be paid on June 9, 1905, the promise so to pay being oral. Kopec took possession on the ninth day of May, and proceeded to carry on the business. During the time he was so carrying on the business he sold nearly the whole of the stock of merchandise which he had bought of the plaintiff, and purchased certain other merchandise from the H. L. Handy Company of Springfield and others for use in the business, which actually was used therein. On June 9 the plaintiff went to Kopec at the store and demanded payment of the amount due him, and Kopec said that he did not have the money. The plaintiff then said that he would get a sheriff and attach the property in the store, to which Kopec replied that he need not do that for he, Kopec, was willing that the plaintiff should take all of the property in payment of the debt due. The plaintiff replied that he was willing to take the property in that way, and both parties then went to an attorney at law who, on being told the above facts and that they wanted a paper to show that the plaintiff was the owner of the property, drew upon the back of the bill of sale mentioned above a transfer and reconveyance of the property, which was signed and delivered by Kopec to the plaintiff, who immediately took possession of the property in payment of the debt. No consideration passed from the plaintiff to Kopec except that the debt was regarded as extinguished by the transfer of the property. The value of the property at this time did not exceed the amount of the debt, and there was no intent to defraud creditors on the part of either the plaintiff or Kopec.

No inventory, such as is required by St. 1903, c. 415, ever was made, no list of creditors was demanded or furnished, nor were the creditors of Kopec ever notified.

On June 12 the defendant took possession of the articles mentioned in the writ by virtue of a valid writ of attachment in favor of the H. L. Handy Company against Kopec, under a valid claim for merchandise delivered to and actually used by Kopec between the days of June 5 and June 9 inclusive. Thereupon the plaintiff brought this action of replevin. Kopec's name was on the store window at the time of the attachment.

The bill of sale of May 9, 1905, from the plaintiff to Kopec began as follows:

"Know all men by these presents, that I, John Gallus of Chicopee, Mass., in consideration of Five Hundred and Fifty Dollars paid by Karol Kopec of said Chicopee, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said Karol Kopec the following goods and chattels, namely, all of my stock of meats, provisions, produce now in my store at No. 67 Exchange street, Chicopee, Mass., and all of my book accts. one ice box, 1 Show case, 1 meat table, three knives, 1 Platform scales, 1 small scales, 1 steel and all the other personal property in said store used in the business, together with the good will of the same."

The reconveyance written on the back of this instrument, executed under seal by Kopec and signed also by a witness, was as follows:

"Chicopee, Mass., June 9th, 1905.

"In consideration of four hundred dollars to me paid this day by John Gallus of Chicopee, Mass., I hereby sell, transfer and deliver all of the within described personal property back to said John Gallus to have and to hold to him and his heirs and assigns forever and I hereby warrant the title to said property and that the same is free from all encumbrances."

*E. A. McClintock & J. P. Kirby*, for the plaintiff.

*J. H. Loomis*, for the defendant.

HAMMOND, J. St. 1903, c. 415, provides that "the sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller" unless certain things are done by the seller and purchaser; and the question is whether the transaction which took place between the plaintiff and Kopec on June 9, 1905, was within the statute. The requisites of the statute were not complied with by either the seller or the purchaser, and the transaction was clearly otherwise than in the ordinary course of the seller's business.

The plaintiff however stoutly insists that the transaction in substance was not a sale, but simply the discharge by way of accord and satisfaction of a pre-existing debt due to him from Kopec. There can be no doubt that there was a discharge of the pre-

existing debt by way of accord and satisfaction; and if, after the transaction, the plaintiff had sued Kopec, the accord and satisfaction would have been a complete defence.

But the transaction had another phase, so far at least as respected Kopec's other creditors. There was a change in the ownership of the property, which, if valid as against them, freed from liability property which theretofore could have been attached by them; and thus their security was impaired. While it is true that in its strictest sense a sale is a transfer of personal property in consideration of money paid or to be paid, still in the interpretation of statutes it is often held to include barter and any transfer of personal property for a valuable consideration. "In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid." Bigelow, C. J., in *Howard v. Harris*, 8 Allen, 297, 299. And accordingly it was held in that case that where the consideration for the transfer of the ownership of a horse consisted of intoxicating liquors which the buyer of the horse was not legally authorized to sell, the transaction was a sale within the meaning of a statute prohibiting the sale of intoxicating liquors.

We are of opinion that the statute in question was intended to prevent a trader from disposing of his stock of merchandise in a manner outside his usual course of business, so that the same should be taken away from his creditors in general, and that the transfer under the circumstances disclosed in this case was a sale although made to a creditor.

The plaintiff still further insists that the statute does not apply to the fixtures, and this view seems correct. The phrase "stock of merchandise," as used in the statute, properly and naturally describes articles which the seller keeps for sale in the usual course of his business. It does not naturally describe fixtures. It would hardly be within the usual course of business for a storekeeper at any time to sell his fixtures, and it is not to be presumed that the Legislature intended to prohibit the sale of a fixture, unless such intent is clearly expressed. The natural reading of the statute makes it applicable, as has been said, only to the articles which in the ordinary course of his



business the seller keeps for sale, and that must be taken to be its legal meaning. See *Albrecht v. Cudihee*, 37 Wash. 206. It follows that the plaintiff may recover the fixtures replevied, but cannot hold the meats and provisions. Upon inspection of the record it appears that certain of the articles were fixtures and tools. For this reason the order must be

*Exceptions sustained.*

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**JAMES W. TOOLE vs. HOWARD A. CRAFTS & another.**

Hampden. September 26, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Bills and Notes Waiver. Fraud. Evidence, Of operation of mind to show effect of fraud.*

If an indorser of a note, after the time for making a demand on the maker required to charge him as indorser has expired without such a demand having been made, signs upon the back of the note a waiver of "demand, notice and protest," knowing the facts which have released him from liability but in ignorance of their legal effect, such ignorance in the absence of fraud does not save him from the consequences of his waiver.

In an action against the indorser of a promissory note, if it appears that, after the time for making a demand on the maker required to charge the defendant as indorser had expired without such a demand having been made, the defendant signed upon the back of the note a waiver of "demand, notice and protest," and the defendant contends that his signing of the waiver was procured by false and fraudulent representations made to him by the attorney of the plaintiff, the defendant may show by his own testimony that at the time he signed the waiver, although he knew the facts, he did not know their legal effect and was not aware that he had been relieved from liability on the note, such evidence of the operation of his mind being admissible upon the question whether the representations made to him by the attorney of the plaintiff were the effective inducement of his action.

CONTRACT on a promissory note against the maker and the indorser as stated in the first paragraph of the opinion. Writ in the Police Court of Holyoke dated August 2, 1904.

On appeal to the Superior Court the case was tried before *Flaherty, J.* The defendant, Howard A. Crafts, the maker of the note, admitted his liability and the judge ordered a verdict for the plaintiff as against him. At the close of the evidence the defendant Linus D. Crafts, the indorser of the note, asked

the judge to rule that on the pleadings and the evidence the plaintiff could not recover against him, and also asked for other rulings, there being in all ten requests. The judge refused to rule as requested, and submitted the case to the jury against the defendant Linus D. Crafts. The jury returned a verdict for the plaintiff in the sum of \$451.83; and the defendant Linus D. Crafts alleged exceptions, which, after the death of *Flaherty, J.*, were allowed by *Hitchcock, J.*

*A. L. Green, (F. F. Bennett with him,)* for the defendant Linus D. Crafts.

*C. T. Callahan,* for the plaintiff.

HAMMOND, J. This is an action upon a promissory note dated April 2, 1900, signed by the defendant Howard A. Crafts and payable to the order of the plaintiff on demand. Before its delivery to the plaintiff the other defendant Linus D. Crafts, who alone defends, placed his name upon the back of it. He is therefore liable only as an indorser. St. 1898, c. 533, § 63, now R. L. c. 73, § 80. No demand sufficient to charge him as indorser ever was made upon the maker, and, if the matter had stood there, his defence would have been perfect. But the matter did not stand there. Upon June 27, 1904, when the time for making a demand upon the maker sufficient to charge the indorser had expired, a conversation took place between one Allyn the attorney for the plaintiff on the one hand and Linus on the other, during which the former wrote upon the back of the note and the latter signed a waiver of "demand, notice and protest." The evidence as to the tenor of the conversation was conflicting, and one question was whether the waiver had reference to a demand, notice and protest which ought to have been made in the past in time to charge the indorser, or to a demand, notice and protest which the plaintiff was about to make. This question was submitted to the jury with proper instructions. The verdict shows that the jury found that the language had reference to the past.

The defendant contended that at the time he signed the waiver he was not aware that he had been freed from his liability, but the judge rightly ruled that if he knew the facts which released him his ignorance as to their legal effect would not save him from the consequences of the waiver. *Third National Bank v. Ashworth*, 105 Mass. 503.

The defendant contended that he was induced to sign the waiver by the false and fraudulent representations of Allyn acting for the plaintiff. This question was submitted to the jury under quite full instructions. The defendant has complained of those instructions, but we have not had occasion to consider them because we are of opinion that a new trial must be had for error in the exclusion of the evidence bearing upon this part of the defence.

To make good his defence of fraud the defendant was bound to show not only that the representations were false and fraudulent but that in reliance upon them he was induced to act as he did. Upon this branch of the defence, the operation of his mind was for the consideration of the jury, and on that subject he was a competent witness. *Knight v. Peacock*, 116 Mass. 362. He offered to show by his own testimony that at the time he signed the waiver he did not know that he had been relieved from liability on the note. This evidence was excluded. While, as above stated, it was not admissible to relieve him from the consequences of his waiver in the absence of fraud, yet upon the question of whether the representations of Allyn were the real and effective inducement to his action it was admissible. It might well be that a man believing himself to be liable upon a note could be more easily influenced to sign such a waiver than one who believed himself free from liability. A reading of the record shows that this evidence was offered at the stage of the defence in which the defendant was trying to prove the fraud. It should have been admitted. Its exclusion may have worked harm to the defendant. It becomes unnecessary to consider the other objections to the exclusion of evidence. They may not arise again.

*Exceptions sustained.*

## SARAH S. WILLS vs. RANSOM F. TAYLOR &amp; another.

Worcester. October 1, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, &amp; RUGG, JJ.

*Nuisance. Negligence.*

In an action against the owner of a building for personal injuries from falling down an elevator well, there was evidence that the plaintiff was a boarding house keeper and was looking for another house in which to carry on her business, that she saw an advertisement of the defendant's building and going to the defendant's office found there an agent of the defendant who gave her the keys of the building and told her to go and see it, that on going to the building she found the outside door open and entered a dark and narrow entry at the end of which she could see a door with ground glass panels in it but could see nothing else, that she supposed it to be the door of the kitchen or dining room and thought she would like to see the room, that she walked forward putting out her hand in front of her on account of the darkness and walked into an elevator well of which the doors were wide open, the elevator car being at the floor above. The door with the ground glass panels was at the back of the elevator well. It had been the door of a doctor's office before the elevator was put in but thereafter had been disused and was closed by a bar. *Held*, that the evidence justified a finding that, in view of the darkness of the entry, the existence of the elevator well and the appearance of the door with glass panels at the back of the well, the defendant was negligent in failing to warn the plaintiff of her danger; that the plaintiff, being upon the premises by invitation of the defendant for the purpose of examining them, was justified, in the absence of any information to the contrary, in thinking that the door led to some part of the building to be let and in trying to reach it as she did; and that the case properly was submitted to the jury.

TORT for personal injuries from falling into an elevator well in a building on Pleasant Street in Worcester owned at the time by the defendants. Writ dated December 24, 1903.

In the Superior Court the case was tried before *Pierce, J.* The jury took a view of the place of the accident, and a plan was in evidence, a blue print of which was annexed to the bill of exceptions.

The plaintiff testified that she was fifty-nine years old; that at the time of the accident she lived at 74 Lincoln Street and was keeping a boarding house; that she had about fifty-two boarders; that the accident happened on September 29, 1903; that she was looking for another house, one with steam heat;

that on the morning of September 29, she saw in the Worcester Daily Telegram of that day the following advertisement: "Apartment block to rent consisting of thirty fine, large, airy rooms, modern, steam heated, passenger and freight elevator from the ground floor. Possession given October 1st. Apply to R. F. Taylor, 438 Main Street"; that thereupon she went to Taylor's office at about nine o'clock on the morning of September 29, and found there a man, whose name she afterwards learned was Butler; that she asked him where this house to let was and he said it was on Pleasant Street, next to Lothrop's Opera House; that he gave her the keys and told her to go and see it; and that when she was going out of the door, he said, "You'll bring the keys back, won't you?" and she said, "I certainly will"; and that no one else was in the office.

The plaintiff's description of the manner in which the accident occurred is quoted in the opinion, where also are stated the other material facts which could have been found upon the evidence.

At the close of the evidence, the defendants asked the judge to rule that, upon the whole evidence, the plaintiff could not recover. The judge refused so to rule and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,000. The jury also made the special findings which are stated in the first sentence of the opinion. The defendants alleged exceptions.

*G. S. Taft, (C. W. Hobbs, Jr. with him,)* for the defendants.

*C. S. Dodge, (W. A. Gile with him,)* for the plaintiff.

HAMMOND, J. The jury specially found that the doors of the elevator well were open at the time the plaintiff went to the building, and that she never had been there before. The evidence warranted those findings. The defendants were the owners of the building, and it was in their charge and possession. While it is true that some repairs had been going on, yet on cross-examination one of the defendants testified that on September 29, the day of the accident, the work was substantially done. He testified: "The plumbers had been out of there three weeks. There were no carpenters there and no paperers there. There was one painter there. I understand that he was gilding the picture mouldings. There were two men on the outside of the building. No one else was in the building except one tenant

(Miss Burns) and we did not depend upon her to see that the elevator was taken care of or the elevator doors closed. She didn't use the elevator but her friends might have used it." In a word, the premises were under the charge of the defendants the owners, and upon them rested the duty of using reasonable care to see that they were safe.

By their invitation the plaintiff went to the house for the purpose of examining it as a prospective tenant. The hallway was narrow. At the rear end of it as originally built there was a door containing ground glass panels, which opened into a doctor's office. Subsequently an elevator was put in by the defendants' predecessor at the rear end of the hallway, with doors opening into the hallway. The door to the doctor's office was left unchanged except that a bar was put across it so that it could not be used. The elevator occupied substantially the whole width of the hall. When the doors of the elevator well were open and the car was as high as the second floor, this ground glass door was plainly visible "on account of the light the other side of it," as one witness testified. The hallway was quite dark, one witness testifying that she "should say it was not light enough in the hall to see anything except the door with the ground glass" which was in the rear.

As to the manner in which the accident occurred, the plaintiff testified as follows: "I went to the block, and found the outside door wide open. I went in and went along the side of the stairs [on one side of the hallway] and saw a door with two panes of frosted glass, and I thought it was the kitchen or dining room. It was so dark I could see only that door. . . . As I did my own cooking, I thought I would like to see the kitchen and, as I was going along, I put my hand out in front of me, as I once ran against a door in the dark. I didn't run it along the side of the house. I could see nothing but that door with frosted glass in it at the end of the hall, and I went along and found myself falling. I opened no door, and saw no door but the one I supposed was the door going into the dining room, that is, the door with the ground glass in it. I saw nothing except that. I did not know there was any well there. I supposed I was going to the dining room, and I remember myself falling, but don't remember hitting the bottom or anything at all."

She was found shortly afterwards at the bottom of the well, nearly, if not quite, unconscious. At the time she was found the doors of the elevator well on the hall floor were open and the car was above at the second floor.

Upon the evidence the jury might well have found that in view of the darkness of the entry, the existence of the elevator well, the appearance of the glass door, and their relative situation, there rested a duty upon the defendants to caution the plaintiff, and that in failing to give such caution the defendants were negligent. And the jury might further find that the plaintiff, being by the invitation of the defendants upon the premises for the purpose of examining them, was justified, in the absence of any information or caution to the contrary, in thinking that the door led to some part of the tenement and in trying to reach it as she did.

*Exceptions overruled.*

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SARAH LEVI vs. WORCESTER CONSOLIDATED STREET  
RAILWAY COMPANY.

Worcester. October 1, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, & RUGG, JJ.

*Equity Jurisdiction, Mandatory injunction, To restrain obstruction of easement, Assessment of damages. Easement. Way. Street Railway. Damages. Equity Pleading and Practice, Alternative decree.*

The issuing of a mandatory injunction to restrain the permanent obstruction of an easement is within the discretion of the court, which has to determine upon the circumstances of each case whether the enforcement of this remedy is equitable.

In a suit in equity seeking for a mandatory injunction, if it appears that the acts of the defendant have destroyed or interfered with a property right of the plaintiff but that it would be inequitable to compel the defendant to restore the condition of things which existed before the acts were committed and an injunction is refused on that ground, the court may retain jurisdiction for the assessment of the damages suffered by the plaintiff.

In a suit in equity against a street railway company which in the construction of its railway had made a deep cut through the land of a private person over which the plaintiff had a right of way, which wholly deprived the plaintiff of the use of the way, the plaintiff asked for a mandatory injunction requiring the defend-

ant to refill the excavation it had made and to restore the way to the condition in which it was before the work of the defendant there was begun. It appeared that to restore things to their former condition would subject the defendant to great inconvenience and loss and would be inequitable and that the defendant offered to give or procure a conveyance to the plaintiff of a new right of way in substitution for the one destroyed. The judge who heard the case made a decree that the defendant should convey or cause to be conveyed to the plaintiff such a substituted right of way. *Held*, that the decree sufficiently provided for the wants of the plaintiff as to the right of way, but that the plaintiff also was entitled to damages for the past acts of the defendant, and that the bill might be retained for the assessment of such damages. The plaintiff however was given the right to file within a time named a rejection of the new right of way offered as a substitute and to ask for full damages for the permanent loss of the right of way without such substitution, in which case it was ordered either that the bill might be retained to assess such damages or might be dismissed without prejudice to the right of the plaintiff to recover damages in an action at law, as the plaintiff might elect.

BILL IN EQUITY, filed in the Superior Court on August 8, 1905, by the owner of a right of way over land of one Tyson in West Boylston and land of the defendant recently purchased by it from Tyson, through which the defendant in the construction of its railway was making a deep cut which wholly would destroy the way, praying for an injunction.

A temporary injunction was issued on the day of the filing of the bill. On August 11, 1905, the parties were ordered to complete the pleadings and the case was referred to a master. On August 22, 1905, the report of the master was filed. No exceptions to the master's report were filed.

The case was heard upon the master's report by *Lawton, J.*, who found the facts to be as found by the master, confirmed the master's report, and filed a memorandum containing an order for a decree. He dissolved the temporary injunction, and later reported the case for determination by this court. If the facts and the law warranted the order, a decree was to be entered in accordance with the order; otherwise, such decree was to be entered as the facts and the law might require.

The judge's memorandum of decision was as follows:

"At the hearing on the master's report the defendant asked that a decree be ordered giving the plaintiff, as her only relief, damages as compensation for the destruction of her way. This I refuse.

"The plaintiff asked that a mandatory injunction should issue



requiring the defendant to refill the excavation it has made and restore the way to the condition in which it was before operations were begun. This I refuse.

"The plan exhibited at the hearing marked by me Exhibit C and now ordered to be filed in the case, shows the new way which the defendant contended was substituted for the old way, as stated in the master's report. The defendant stated at the hearing that it can and will, if directed by the court, procure from Caroline E. Tyson the defendant's grantor a deed of such portion of this new way as passes over her land and that it will itself give a deed of such portion of the new way as passes over its land so that it can grant to or procure for the plaintiff such new right of way. I therefore confirm the master's report, order a decree that the defendant shall convey or cause to be conveyed to the plaintiff by a good and sufficient deed a right of way eight feet wide over the land of Caroline E. Tyson and over its own land and by a course substantially as laid out on said plan Exhibit C [describing the line of the way]; and that the defendant shall pay to the plaintiff her costs taxed as at common law."

The plan marked Exhibit C has not been reproduced because the exact situation of the way offered in substitution did not appear to be material.

*J. W. Sheehan*, for the plaintiff.

*C. C. Milton*, for the defendant.

HAMMOND, J. "It is not every case of a permanent obstruction in the use of an easement that entitles the aggrieved party to a restoration of the former situation. Each case depends on its own circumstances. It is for the court, in the exercise of a sound discretion, to determine in such instances whether a mandatory injunction shall issue. It will not be issued when it appears that it will operate inequitably and oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor when the injury complained of is not serious or substantial, and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss." *Morton, J. in Starkie v. Richmond*, 155 Mass. 188, 195, 196, citing Story Eq. Jur. § 959 a;

Kerr, Injunctions, (1st Am. ed.) 231 ; *Royal Bank of Liverpool v. Grand Junction Railroad*, 125 Mass. 490 ; *Lewis v. Chapman*, 3 Beav. 133 ; *Gaskin v. Balls*, 13 Ch. D. 324 ; *Aynsley v. Glover*, L. R. 18 Eq. 544.

No discussion is required to show that upon the facts found by the master this case is one which calls for the application of this principle. It is manifest that to restore things to the former situation would subject the defendant to great inconvenience and loss and is inequitable, and that the decree ordered by the trial court sufficiently provides for the wants of the plaintiff as to the 'right of way. She should however have recompense for the damages in the past, and the bill may be retained to assess such damages. *Jackson v. Stevenson*, 156 Mass. 496. *Cobb v. Massachusetts Chemical Co.* 179 Mass. 423. As thus amended the order for the decree is to stand, unless the plaintiff within thirty days from the filing of the rescript in this case shall file a rejection of the new right of way proposed as a substitute, and shall ask full damages for the permanent loss of the right of way without such substitution, in which case the bill may be retained to assess such damages or may be dismissed without prejudice to her right to an action at law for damages, as she may elect.

*So ordered.*

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CARL ERICKSON vs. AMERICAN STEEL AND WIRE COMPANY  
OF NEW JERSEY.

ANNIE M. JOHNSON, administratrix, vs. SAME.

EDWARD G. MATTHEWS vs. SAME.

Worcester. October 1, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, & RUGG, JJ.

*Negligence*, Employer's liability. *Evidence*, Circumstantial, Opinion: experts, Remoteness.

In an action by a workman in a factory against his employer for personal injuries from the bursting of a cast iron header or section of steam pipe connected with a boiler and which with other similar sections of pipe, each connected with a separate boiler, formed bolted together a continuous line of pipe constituting

the steam main of the defendant's power plant, it appeared that, although the defendant purchased the headers at a reputable foundry where they were tested, the machine work upon the castings was done at the defendant's shop and the steam main was put together and put in place with its connections to the boilers by the defendant's employees and according to a design both as to construction and connections made by the defendant's engineer, that the work during construction was examined by a competent inspector, that the defendant applied to the headers and the steam main the usual tests before the plant was used and made the customary inspection while the plant was in operation. There was evidence from competent experts that the construction of the plant was not proper mechanically, because sufficient arrangements were not provided for the expansion of the steam main, the want of which would have a tendency to weaken the joints throughout the length of the pipe, and because no drip cocks were provided as they should have been along the line of the pipe, and also because cast iron was an unsuitable material of which to make the headers on account of its brittleness and rigidity and because the method of connecting the feed pipes from the boilers to the main pipe was improper. *Held*, that the fact that the defendant purchased the headers from a reputable manufacturer was no defence, even assuming that, because the material was in common although not exclusive use, the use of cast iron headers was not negligence, for the castings after their purchase were finished by the defendant and incorporated into a structure according to the design of the defendant's engineer, the faulty character of which could have caused the break if the castings had had no hidden defect; and that the evidence of competent inspection, although it tended to show that the defendant took all the precaution which ordinary prudence required, was not a defence to its liability for a failure to use due care in providing safe appliances for its workmen; that the plaintiff was not required to show the particular cause of the accident, it being sufficient for him to produce evidence of defects in the construction of the steam main which with the evidence of its breaking would warrant the inference by the jury that the accident was due to the negligence of the defendant; and that the case properly was submitted to the jury.

In an action by a workman against his employer for personal injuries alleged to have been caused by the failure of the defendant to provide safe appliances for the plaintiff's use, the plaintiff is not required to show the particular cause of the accident, and is entitled to go to the jury upon evidence of defects in the construction of the defendant's appliances which together with the happening of the accident would justify the jury in inferring that the plaintiff's injuries were due to the negligence of the defendant.

In an action by a workman against his employer for personal injuries from the bursting of a cast iron header to a boiler forming part of the steam main of the defendant's power plant, in which one question at issue is whether the material selected by the defendant for the pipe should not have been wrought iron instead of cast iron, it is competent for the plaintiff to show by an expert having special knowledge of the subject matter that in his opinion the best form and quality of cast iron is unsuitable for a pipe of this character on account of its brittleness under the temperature to which it is likely to be subjected.

In an action by a workman against his employer for personal injuries from the bursting of a cast iron header to a boiler forming part of the steam main of the defendant's power plant, the presiding judge excluded the following question addressed by the defendant to its master mechanic: "Is it customary in the well conducted concerns with which you are familiar, to adopt a hydraulic test or

a hammer test on a steam line of substantially this description, after it has been installed and in operation?" The ground of the exclusion did not appear. *Held*, that, whether the question was excluded on the ground that the experience of the witness with other plants was not wide enough to make his testimony of any value or on the ground that the inquiry was immaterial or that the nature of the information sought was too remote from the issue on trial, the exclusion was within the discretion of the presiding judge.

**THREE ACTIONS OF TORT** for personal injuries suffered severally by three servants of the defendant through the bursting of a steam pipe or header connected with one of the boilers in the power plant of the defendant at Worcester. Writs dated respectively October 21, December 16 and November 22, 1904.

Annie M. Johnson, the plaintiff in the second case, was the widow of Alfred Johnson, one of the injured workmen, who died six days after the accident, and the administratrix of his estate.

In the Superior Court the cases were tried together before *Pierce, J.* In each case notice of the time, place and cause of the injury had been given to the defendant in accordance with the requirements of the employers' liability act. It appeared that at about twenty minutes after five on the afternoon of September 13, 1904, the plaintiff's intestate in the second case and the plaintiffs in the other cases were employed by the defendant and were at work in a room in building No. 12 at the North Works of the defendant in Worcester; that this building was a few feet distant from the boiler house of the defendant and was a separate building; that there came a noise and a rush of steam into the room where they were at work which scalded and injured seven persons, more or less severely, three of whom were the plaintiff's intestate in the second case and the plaintiffs in the other cases; that the steam came from the bursting of a cast iron header or steam pipe eight feet long and fourteen inches in diameter connected with boiler No. 13 in the defendant's power plant; that this header was one of seventeen similar headers, each connected with a boiler and constituting the defendant's power plant; and that the headers were bolted together so as to form one continuous line of pipe. The evidence is described in the opinion.

At the close of the evidence the defendant asked the judge in each of the three cases to rule that upon all the evidence the

plaintiff could not recover and to order a verdict for the defendant. In each case the judge refused to rule as requested and submitted the cases to the jury in a charge which was not excepted to by either party in any of the cases. The jury returned verdicts for the plaintiffs, in the first case in the sum of \$3,000, in the second case in the sum of \$5,000, and in the third case in the sum of \$2,500. The defendant in each case alleged exceptions to the refusal to rule as requested and also to the admission of certain evidence and the exclusion of certain other evidence as described in the opinion.

*F. F. Dresser*, for the defendant.

*W. Thayer*, (*C. B. Perry & V. E. Runo* with him,) for the plaintiffs.

RUGG, J. The fundamental question in these cases is, whether the defendant was negligent in the construction and maintenance of its steam power plant. The plaintiffs in the first and third cases and the plaintiff's intestate in the second case were employees of the defendant working in a room adjoining the boiler room, in which a steam main burst, causing their injuries. Seventeen horizontal boilers were placed side by side in the boiler room. The steam main connecting with the boilers, including an expansion pipe on the end, was about one hundred forty-five feet long, with an inside diameter of fourteen inches and a thickness of one and one eighth inches to one and one fourth inches. The steam main was composed, outside of the expansion pipe, of seventeen headers, so called, made of cast iron, one for every boiler, each eight feet long with flanges on both ends, so that they could be bolted together, thus making a continuous steam main or pipe. Out of the lower side of each and connecting with it by a nozzle or T shaped piece, coming out of and forming a part of the header, was a six inch wrought iron pipe which, after making an angle, entered vertically its boiler. The dimensions of these headers were sufficient, if of cast iron without flaw or defect, to sustain a steam pressure of one hundred twenty-five to one hundred fifty pounds to the square inch, with a factor of safety of twenty-one, which means that it would carry a pressure twenty-one times as great before breaking.

The line of headers which constituted the steam main was supported on brackets attached to brick piers. The headers

rested on rollers on the brackets, which permitted the steam main to move back and forth lengthwise on them, as it expanded with the heat. The expansion of the entire length was about three inches.

Between boilers ten and eleven there was a blank flange or cut-off so that boilers one to ten could be run at one pressure and eleven to seventeen at another pressure, and they were being so run at the time of the accident, although when the plant was first installed in 1896, the boilers which were first put in use were all run at the same pressure.

At the time of the accident, boilers one to ten were carrying one hundred fifty pounds of steam pressure and those numbered eleven to seventeen one hundred twenty-six pounds pressure. At the high pressure end the main was anchored through a brick wall with a nut and rod so that it could be tightened and stop the vibration. When tightened, it could not expand over half an inch at that end. At the other end of the steam main was a gooseneck, so called, which was a ten inch pipe sloping downward from the main for a considerable distance and then up again in another part of the building. This device permitted expansion at that end. There was no drip cock upon this gooseneck, but an elbow, designed to take return water and condensed steam back to the boilers. Upon the main steam line there was no expansion valve and there were no drip cocks.

The headers were purchased by the defendant at a reputable foundry, where they were tested, but the machine work upon the castings was done at the defendant's shop and the steam main was put together and in place with its connections to the boilers by the defendant's employees, and according to a design, both as to construction and connections, made by the defendant's engineer. It was examined during construction by one Allen, who was a steam engineering inspector of wide experience, and in part was tested by him; and he approved it in most, if not all, respects. The defendant applied to the headers and the steam main the usual tests before the plant was put in use and made the customary inspection while the plant was in operation.

On the day of the accident, the header of boiler thirteen blew

out on the back side opposite where the steam went in, leaving the main pipe in place and blowing out a space eighteen or twenty inches in length.

Examination showed that at the place of the break, the cast iron was spongy, stogy or porous, but this condition was concealed by a skin of good iron on the outside one sixteenth to one eighth of an inch in thickness and on the inside one fourth to one half an inch in thickness. The porous part did not show on the inside or outside of the pipe. At the defective place the good iron was between one fourth and one half an inch thick which should bear over one thousand pounds pressure of steam.

There was evidence from several of the witnesses, whose familiarity with the construction and operation of steam plants was not in question, that the plan of this steam pipe line with its boiler connections and anchorage was defective. The professor of steam engineering at the Worcester Polytechnic Institute testified that it was not a mechanically proper construction, because sufficient arrangements were not provided for the expansion of the steam main, whereby there would be a tendency to weaken the joints throughout the length of the pipe, and that drip cocks along the line of the pipe were necessary, although none were provided, and that cast iron was an unsuitable material of which to make the headers, because of its brittleness or rigidity, and that the method of connecting the feed pipes from the boilers to the main was improper. This testimony was supplemented in important particulars by another witness of acknowledged experience. The defendant invokes the rule applied in *Fuller v. New York, New Haven, & Hartford Railroad*, 175 Mass. 424, to the effect that it had performed its whole duty when it purchased the castings, out of which the main steam pipe was made, from a reputable manufacturer. One of these castings proved to be to some extent defective by reason of spongy metal, but this defective material was covered on both sides by good metal of a thickness sufficient, upon the undisputed evidence, to withstand a steam pressure of one thousand pounds, while it was being subjected at the time of the accident to only one hundred fifty pounds pressure. This evidence strongly points to some other cause for the accident than the defective casting. But this rule has no application to the facts here

disclosed, for the reason that the castings after being so purchased were finished by the defendant and were incorporated into a structure according to a design prepared by its own engineer, which, apart from any hidden defect in the castings, was asserted by the plaintiffs to have been defective in important particulars, which could have caused the break complained of.

The defendant stoutly contends that the employment of Allen to inspect the construction and his approval of it as a competent expert in such matters exonerates it from culpability. The defendant undertook, through its own agents, to design, manufacture and install its steam main and boiler connections. The castings for the headings, so far as appears, were the only materials purchased of other manufacturers. The defendant itself thus assumed to perform its general obligation of using proper care to provide safe machinery, appliances and apparatus for its servants to work with. It cannot relieve itself from this responsibility by showing that it employed competent engineers to design and set up the appliances in question, or to inspect them after being in place. This is weighty evidence as tending to show that it took all the precaution which ordinary prudence required. *Shrewsbury v. Smith*, 12 Cush. 177. But the defendant must still bear its original responsibility of using due care to provide safe appliances. If there is any neglect on the part of the designing engineer, the principal is responsible for it. *Moynihan v. Hills Co.* 146 Mass. 586. *Hove v. Boston & Northern Street Railway*, 187 Mass. 67.

If it be conceded for the moment that for the use of cast iron as the material for the steam main the defendant might not be liable because it was a material in common, though not exclusive, use, there is nevertheless evidence from which the jury might have inferred that the accident was occasioned by failure to provide a sufficient number of drip cocks or drains along the steam main, or by the anchorage of the main in such a way as to hamper its expansion and perhaps by other causes. The weight to be given to the evidence is not now to be determined. It is only for us to say whether there was sufficient evidence to support a verdict in favor of the plaintiffs upon any of the counts. The plaintiffs were not required to show the particular cause of the accident. It was enough to proffer evidence of defects in



the construction of the steam main, which, coupled with its breaking, might warrant the jury in inferring that the accident was due to the negligence of the defendant. *Melvin v. Pennsylvania Steel Co.* 180 Mass. 196.

Two questions of evidence are raised by the defendant. One Reeve, duly qualified as having special knowledge respecting the subject matter, testified, against the defendant's exception, that the very best form and quality of cast iron was unsuitable for a pipe of this character, in his opinion, because of its brittleness under the temperature to which it was likely to be subjected. One question at issue was whether the material selected by the defendant for the pipe should not have been wrought iron instead of cast iron. It was the duty of the defendant to furnish reasonably safe and suitable appliances, so that they would not be likely to break and injure its employees. *Littlefield v. Allis Co.* 177 Mass. 151. It was competent for the plaintiffs to proffer the opinion of an experienced witness as to whether there were unusual risks in the use of cast iron in the particular place where it was installed by the defendant, and whether the accident which occurred resulted from such use. *Chalmers v. Whitmore Manuf. Co.* 164 Mass. 532. *Arnold v. Harrington Cutlery Co.* 189 Mass. 547. The testimony objected to was directed toward this end.

The defendant asked one Smith, its master mechanic, "Is it customary in the well conducted concerns with which you are familiar, to adopt a hydraulic test or a hammer test on a steam line of substantially this description, after it has been installed and in operation?" This question was excluded. The ground of the exclusion does not appear, but it may well have been that the judge decided that the witness's experience with other plants was not wide enough to make his testimony of any value. Moreover, the materiality of the inquiry does not clearly appear and at best the nature of the information sought was somewhat remote from the issue to be passed upon. The ruling must be sustained as being within the discretion of the presiding judge. *Dolan v. Boott Cotton Mills*, 185 Mass. 576.

*Exceptions overruled.*

JOHN F. HANNAN vs. AMERICAN STEEL AND WIRE  
COMPANY OF NEW JERSEY.

Worcester. October 2, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, &amp; RUGG, JJ.

*Negligence, Employer's Liability.*

In an action by an experienced workman in a wire factory against his employer, for personal injuries from the breaking of a bolt of a wire drawing machine on which he had worked for fourteen years previous to the accident the plaintiff testified that when rolling wire with the machine the wire sometimes would get twisted, and that when a kink came he had to step on the treadle of the machine to stop it, that, if the machine was not stopped and the kink got as far as the die, it was likely to injure the die so that repairs would be necessary, that on the day in question while he was working the machine he saw a kink coming toward the die, that he stepped on the treadle with one foot to stop the machine and, the treadle not going down, then got on with both feet, using all the strength he possessed to put down the treadle, but that the bolt which attached the treadle to the leaders broke and he came down on both heels on the floor, sustaining the injuries sued for. There was no evidence as to when the bolt was put in the machine or whether it ever had been inspected, and there was evidence that there was an old flaw at the point of breakage, one part of the break looking fresh and another part rusty. There was conflicting evidence as to whether the flaw or rusty part was visible on the surface of the bolt before the break. *Held*, that the questions of the due care of the plaintiff and of the negligence of the defendant were for the jury.

TORT by a workman for personal injuries incurred while working in the wire factory of the defendant at Worcester, caused by the breaking of a bolt in a wire drawing machine which the plaintiff was operating, with counts both under the employers' liability act and at common law, alleging respectively a defect in the ways, works or machinery of the defendant, negligence of a superintendent and defective appliances. On motion of the defendant the plaintiff afterwards filed a bill of particulars alleging that the defect mentioned in his first and third counts consisted of a defective bolt to which was attached a lever or treadle of the machine operated by the plaintiff. Writ dated June 8, 1905.

At the trial in the Superior Court *Pierce, J.* at the close of the plaintiff's evidence ruled that there was no evidence on

which the plaintiff could recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*J. W. Sheehan*, for the plaintiff.

*F. F. Dresser* for the defendant.

HAMMOND, J. The plaintiff, who was an experienced workman and had worked on this machine fourteen years, testified that "in rolling when wire is rolled hot, the wire gets twisted sometimes, and then sometimes a kink comes in the wire and I have to step on the treadle to stop the machine. If I do not stop the machine, . . . the kink would go as far as the die, and when it gets to the die of course will break and won't go through, and sometimes it will injure the die" so that repairs have to be made. As to the circumstances of the accident he testified as follows: "This kink was coming towards the die and I . . . [saw] . . . the wire coming off the reel, and I stepped on the treadle to stop the machine. . . . To save the wire, I stepped on the treadle of the machine to stop the machine, and I got on both feet using all the exertion I was possessed of to put down the treadle, but the treadle usually went down like a spring-board, but this time the bolt which attached the treadle to the leaders broke, and I came on both heels on the floor. . . . I came down on the floor unexpectedly, using all the exertion I could to stop the machine." On cross-examination he testified, "I stepped on the treadle first with one foot and then brought up the other and stepped on it. I had to put on one foot before I could put on the other. I then had to jump up and down to force it down. I weigh probably a hundred and fifty-five pounds. While I was jumping the treadle broke."

It is argued by the defendant that the plaintiff was careless in subjecting the treadle to such a violent and unusual strain as he describes. But there was a necessity for stopping the machine, and we cannot say as matter of law that the plaintiff used unusual or unreasonable force in his attempt. This question was for the jury.

The difficult question is whether there was evidence enough to warrant a finding of negligence on the part of the defendant. In view of the use for which the bolt was intended, the fact that it broke in the manner described (provided the jury found that the plaintiff was using the machine in a reasonable way) was

evidence that it was defective and unsafe. The defendant was charged with the duty to exercise reasonable care to keep its machinery in a safe condition for use. The machine had been used fourteen years. There is no evidence as to when this bolt was put in, or whether it was ever inspected. There was evidence that there was an old flaw at the point of breakage, but as to the nature of the flaw the evidence was somewhat vague and conflicting. One Hickey, called by the plaintiff, testified that he "saw the ends that were broken. . . . The piece appeared to me a little flaw like, a bit rusty where it broke. . . . The rest appeared pretty fresh. One part looked fresh and one part looked rusty. About a quarter of an inch as near as I can figure it. Part of it looked fresh and part of it looked as though not a fresh break. The part that looked as though it was not a fresh break was the middle of the break. With reference to the circumference it was the middle of the bolt. Where it broke there was a piece that was rusty that was broken before. I could not very well tell where it was with regard to the outside circumference of the bolt." When asked whether this would come next to the surface or inside the surface he answered, "Inside of it," and when asked if it came to the surface he said, "Yes, it came up all right there, the rusty part. It extended a quarter of an inch from the surface."

One Burns, also called by the plaintiff, testified: "I could see of course that the bolt was kind of rusty where the break was, . . . what you would call a flaw. This was right where it broke. . . . I couldn't say with regard to the circumference of the end of the bolt whether it was in the surface or in from the surface. I couldn't say how deep it was. . . . Should say pretty close to it [the surface]." The "old and rusty piece" was "inside where the break was. You might say almost to the surface. You could see a rusty place." "Did not notice" "whether the rust extended to the surface."

The plaintiff testified on his first examination that a few minutes after the accident he showed the bolt to Watson the foreman and "called his attention to the flaw on both sides of the bolt," and, upon being recalled after the other witnesses had left the stand, said that the flaw was "located on the surface, extending from the surface in. . . . I should say about an

eighth of an inch . . . very nearly half [around the surface] . . . one third at least." The pieces of the broken bolt were shown to the jury but one of the pieces had been subjected to the action of fire since the accident, to such an extent as to change materially its shape and appearance.

Upon this branch of the defence the case is close, but in view of the testimony of the plaintiff and the appearance of the pieces of the broken bolt, we are of opinion that the questions whether the break was due to the defective condition of the bolt, and whether the defect might and should have been discovered by a proper inspection, were for the jury. See *Gould v. Boston Elevated Railway*, 191 Mass. 396; *Toy v. United States Cartridge Co.* 159 Mass. 313; *Murphy v. Marston Coal Co.* 188 Mass. 385.

*Exceptions sustained.*

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SARAH E. ORMANDROYD vs. FITCHBURG AND LEOMINSTER  
STREET RAILWAY COMPANY.

Worcester. October 2, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence. Street Railway. Carrier, Of passengers.*

A street railway company is not liable for an injury to a passenger incurred while travelling in one of its open cars on the Fourth of July from being struck by the wadding of a cannon fired with a blank cartridge by a patriotic citizen in celebration of the day in the door yard of his house adjoining the street on which the car was passing, although the citizen had been firing the cannon practically all day as often as it could be loaded and several hundred cars of the defendant had passed while he was doing so, and the superintendent who had charge and control of the operation of the railway on that day had noticed for many years that in the city where the accident occurred there was a great deal of discharging of firearms on every Fourth of July.

The duty of a street railway company to protect its passengers from injury does not extend to exercising on the Fourth of July a supervision of the details of the firing of cannon and other demonstrations of patriotic emotion by citizens along the line of a highway through which its cars pass, and it is not the duty of its servants when a car is about to pass a door yard where a cannon is being fired in such a demonstration to stop the car and make an investigation to determine whether the cannon is loaded and pointed properly.

TORT, with a count in contract, against a street railway company for personal injuries received by the plaintiff while she was a passenger on an open car of the defendant on July 4, 1905, from being struck by the wadding of a cannon discharged by one Ouellet in his door yard upon River Street in Fitchburg. Writ dated September 18, 1905.

In the Superior Court the case was tried before *Pierce, J.* The use of the cannon by Ouellet during the day is described in the opinion.

The cannon was eighteen inches long mounted on a wooden block six inches high, and its discharge made a loud noise which could be heard two hundred feet away and sent out a jet of flame and a volume of smoke as far as the sidewalk, which could be seen from the defendant's tracks in either direction, and the cannon itself could be seen at a point directly opposite it from either of the tracks. The plaintiff was a passenger on an open car of the defendant proceeding on the east bound track, which was the track farthest from the yard and the cannon, and was struck and injured by the wadding from the cannon, which was discharged at or about the time she was struck. She was in the exercise of due care. The superintendent of the defendant had lived in the city of Fitchburg for twenty years before the accident and had charge and control of the operations of the defendant at the time of the accident. He knew and had noticed for a number of years that on the fourth day of July of each year in that city there is a great deal of discharging of firearms. The car was not stopped on approaching the place when the cannon was being discharged and no precautions were taken by the defendant to guard the passengers against the consequences of such discharges.

At the close of the evidence for the plaintiff the judge ruled that the plaintiff could not maintain her action, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*C. H. Blood*, for the plaintiff.

*C. F. Baker & W. P. Hall*, for the defendant.

HAMMOND, J. The evidence did not warrant a finding of negligence on the part of the defendant. The accident happened about half past five in the afternoon of July 4, 1905. With the exception of one or two rests, each lasting less than

an hour, one Ouellet, who seems to have devoted the day to a patriotic celebration, had been discharging the cannon "practically all day since four o'clock in the morning until the time of the accident, as often as it could be loaded, which took from five to fifteen minutes." Ever since half past five in the morning the cars of the defendant had been passing by this locality, so that up to the time of the accident several hundred cars had passed. It was a day for fireworks of every description. The cannon was loaded with blank cartridges, and was in Ouellet's yard, quite a distance from the street, sending out "a jet of flame and a volume of smoke as far as the sidewalk," several feet short of the defendant's car tracks. The defendant had no reason to anticipate any danger to its passengers from such a source. Nor was it bound to stop its car and investigate for the purpose of seeing whether the cannon was properly loaded or pointed. The firing had been going on all day and, in the absence of any indication to the contrary, the defendant had the right to assume that it was not a hostile demonstration against the travellers upon the highway, but was a simple ebullition of patriotic emotion, and as such was harmless. To require a street railway corporation to have a general oversight of the details of such exhibitions along the line of the highway on the anniversary of the Declaration of Independence, and to hold it responsible for the consequences to its passengers of any neglect of the exhibitors would be unreasonable. Such care would be inconsistent with the proper transaction of the business. It might keep the passengers safe, but the cars would practically be at a standstill most of the time and their proper efficiency would be greatly impaired. The case widely differs from those cases where the railway corporation has reason to anticipate danger from a crowd of rioters or from other causes.

*Exceptions overruled.*

MARGARET THOMPSON vs. GARDNER, WESTMINSTER AND  
FITCHBURG STREET RAILWAY COMPANY.

WALTER T. THOMPSON vs. SAME.

Worcester. October 2, 1903. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

It is not the duty of the conductor of a street car, which has stopped on a street of a country town for passengers to alight, to warn a woman passenger about to step from the car that there is a gutter between the car and the sidewalk in the form of a ditch about one foot wide and about one foot deep, and, if the passenger in alighting steps into the gutter and is injured, in an action brought by her against the railway company operating the car for her injuries, the failure of the conductor to warn her of the existence of the gutter is not evidence of negligence on the part of the company.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries received when alighting from an open electric car of the defendant on Park Street in the town of Gardner at about eight o'clock in the evening of August 16, 1903, and the second by the husband of the plaintiff in the first case for the loss of her services by reason of her injuries. Writs dated November 2, 1903.

In the Superior Court the cases were tried together before *De Courcy, J.* The material evidence is described in the opinion. At the close of the evidence the judge ordered verdicts for the defendant; and the plaintiffs alleged exceptions.

*J. F. McGrath, (J. P. Carney with him,)* for the plaintiffs.

*J. A. Stiles,* for the defendant.

HAMMOND, J. These two actions brought to recover damages by reason of injuries received by the plaintiff in the first action were tried together. We shall speak only of the first because the second stands or falls with it.

The defendant's track ran by the side of the road; and between the track and the sidewalk there was a gutter in the form of a ditch about one foot wide and about one foot deep, the nearest line of the ditch being two and one half feet from



the nearest rail of the track. The car stopped for passengers to alight. It was about eight o'clock in the evening of the sixteenth day of August. As to the circumstances the plaintiff testified that when the car stopped she stood up to get off on the "usual side," "the left hand side"; that "there were people standing between the seats and between her and the left hand side (which was the street side); that she was standing facing the front of the car with her right hand toward the sidewalk; that she saw the conductor go around to the sidewalk side of the car; that he passed right by them [herself and a little girl who was with her] and did not offer to help her off; that she heard one bell rung, and . . . [the] . . . little girl who was with her hopped off, and then another bell rung, and she stepped on to the running board, and then stepped off (on sidewalk side) from the car, as she thought the car was going to start up; that she stepped off with the left foot, and stepped right into the ditch; that the bell did not ring but once, and that after the little girl stepped off it rang again; that when she got on to the running board she stood facing the sidewalk and looked out toward the sidewalk and saw what she thought was level ground; that there were no lights there; . . . that when she stepped into the ditch she was hurt."

The car did not start until after she had alighted. The place where the car stopped was a part of the highway over which the defendant had no control. The case is thus distinguishable from cases like *Joslyn v. Milford, Holliston & Framingham Street Railway*, 184 Mass. 65. "The street is in no sense a passenger station, for the safety of which a street railway company is responsible." Barker, J. in *Creamer v. West End Street Railway*, 156 Mass. 320, 321. The plaintiff however contends that it was the duty of the conductor to caution her against stepping into the gutter, and that his failure to do so was negligence. But this contention is untenable. Gutters like the one described are not uncommon features of streets in our country towns. They are generally between that part of the highway which is wrought for public travel and the sidewalk. The plaintiff knew that she was alighting from the car upon the "sidewalk side," and the conductor may well have assumed that she was familiar with the existence of gutters and would govern herself accordingly.

His failure to warn her was not negligence. See *Bigelow v. West End Street Railway*, 161 Mass. 393.

It is unnecessary to consider what would have been the duty of the conductor had there been some unusual cavity into which she was likely to fall.

*Exceptions in each case overruled.*

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ELLA V. WARD vs. CALEB S. MERRIAM.

Worcester. October 3, 1906. — October 17, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Libel and Slander. Practice, Civil. Pleading, Civil.*

In an action for slander an exception of the defendant to a refusal of the presiding judge to rule, that if the defendant spoke certain words which the defendant has testified that he spoke instead of those alleged in the declaration the plaintiff cannot recover for the words set forth in the declaration, is disposed of by a special finding of the jury that the defendant used the language set forth in the declaration, which makes the effect of the other words immaterial.

In an action for slander, if the defendant failed to demur to the declaration and went to trial on the issues raised by the pleadings, after a verdict for the plaintiff at the argument of an exception to the refusal of the presiding judge to rule that the plaintiff could not recover on the declaration, the defendant cannot take advantage of the point that the declaration does not set out a cause of action by reason of its failure to state sufficient circumstances to show the sense in which the words were spoken, and the only argument open to him is that upon all the evidence the words were spoken under such conditions as not to be slanderous.

In an action for slander the words "W. (meaning the plaintiff's husband) has sold half of his wife to L. hasn't he?" may be found under the circumstances in which they were used to have been spoken in such a sense as to amount to a charge of adultery, and the fact that the statement was put in the form of a question makes it none the less slanderous.

In an action purporting to be by a married woman for charging her with the crime of adultery by spoken words, whether after a verdict for the plaintiff the defendant at the argument of an exception to a refusal of the presiding judge to rule that the plaintiff could not recover can raise for the first time the question of the sufficiency of the proof as to the plaintiff being a married woman, *quære*.

In an action purporting to be by a married woman for charging her with the crime of adultery by spoken words, in the absence of any evidence tending to show that the plaintiff was not married it is sufficient for her to show that she was reputed to be a married woman.

TORT for alleged slander. Writ dated September 13, 1904.

The first count alleged that the defendant on September 7, 1904, charged the plaintiff with the crime of adultery by words spoken of her substantially as follows: "Ward (meaning the plaintiff's husband) has sold half of his wife to Legeyt (meaning Warren Legeyt) hasn't he?"

The second count alleged that the defendant on September 9, 1904, charged the plaintiff with the crime of adultery by words spoken of her substantially as follows: "She (meaning the plaintiff) is nothing but a damned whore anyway."

The third count alleged that the defendant on September 9, 1904, charged the plaintiff with the crime of adultery by words spoken of the plaintiff substantially as follows: "You (meaning Warren Legeyt) use (meaning commit adultery with) her (meaning plaintiff) one half the time and Ward (meaning the plaintiff's husband) half the time."

No special damage was alleged. The defendant's answer contained a general denial and alleged a privileged communication.

In the Superior Court the case was tried before *DeCourcy*, J. The plaintiff's evidence showed that on September 7, 1904, the defendant asked one Hayes, who at the time was with the defendant and the plaintiff's witness, the question set out in the first count of the plaintiff's declaration. The witness testified that the defendant said "Is Warren Legeyt boarding there?" and the witness said "He is coming there to-night," and that then the defendant wanted to know if Mr. Ward had not sold half his wife to Mr. Legeyt.

The words set out in the second and third counts of the plaintiff's declaration, according to the plaintiff's witness, Warren Legeyt, were uttered to Legeyt, who was alone at the time with the defendant, on September 9, 1904. Legeyt testified that the defendant was standing on the sidewalk when he drove up to him and asked him what he was saying about Mrs. Ward and himself; that after some conversation which did not concern the case the defendant said "that Ward had sold me half his wife to pay me for committing perjury in the Roper case. He said that I used her half the time and that Ward used her half the time. He said she was nothing but a damn whore."

The defendant, who was about eighty-eight years of age,

denied ever having uttered any of the words set forth in the different counts of the plaintiff's declaration, but admitted that on September 7, 1904, he did ask Hayes "If Legeyt had bought one half of Ward's wife."

At the close of the evidence the defendant asked the judge to rule that the plaintiff could not recover on the first and third counts. The judge refused to rule as requested, and the defendant excepted. The defendant then asked the judge to instruct the jury that if the defendant said, "Has Legeyt bought one half of Ward's wife," the plaintiff could not recover for the words set forth in the first count of her declaration. The judge refused to give this instruction and the defendant excepted. The judge submitted in writing to the jury this question: "Did the defendant in his conversation with Hayes use the language set forth in the first count?" The jury answered "yes."

The judge submitted the case to the jury on all the counts with instructions to which no exception was taken. The jury returned a general verdict for the plaintiff in the sum of \$550; and the defendant alleged exceptions.

*C. E. Tupper*, for the defendant.

*D. I. Walsh & T. L. Walsh*, for the plaintiff.

RUGG, J. This is an action for slander. At the close of the evidence, the defendant requested rulings that the plaintiff could not recover upon the first and the third counts. He also asked for a specific ruling as to the effect of certain words which the defendant testified that he spoke instead of those alleged in the first count. By an answer to a question, the jury found that the defendant used the language set forth in the first count. On this ground the defendant's exception to his request for the specific ruling must be overruled.

The question presented by the other two requests is a very different one from that which would arise if the defendant had demurred. The defendant having failed to demur and having gone to trial upon the issues raised by the pleadings as they stood, it is not now open to him to raise the point that the first and third counts do not set out a good cause of action. Although the declaration may not set out a cause of action by reason of a failure to state sufficient circumstances to show the sense in which the words were spoken, this objection can be taken only

on demurrer. After verdict, it is only open to the defendant to argue that upon all the evidence the words were spoken under such conditions as not to amount to the charge of a crime. *Chace v. Sherman*, 119 Mass. 387. Many of the cases cited by the defendant arose upon demurrers and are therefore of little weight upon the question now open for consideration.

Taking into account all the circumstances disclosed by the evidence, there was enough to warrant the jury in finding that the words were spoken in such a sense as to amount to a charge of adultery. It is of no consequence that the statement was put in the form of a question. Insidious and harmful insinuations may often be conveyed under the cover of an inquiry. If it is open to the defendant now to question the sufficiency of the proof as to the plaintiff being a married woman (*Oulighan v. Butler*, 189 Mass. 287), there was enough to warrant a finding that she was so reputed, and this, in the absence of any other evidence, was all that was required of the plaintiff. 1 Greenl. Ev. § 140.

*Exceptions overruled.*

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HARVEY-WATTS COMPANY & others vs. WORCESTER  
UMBRELLA COMPANY & others.

Worcester. October 2, 1906. — October 20, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Equity Pleading and Practice*, Appeal. *Corporation*, Statutory liability of officers and directors. *Payment*, In cash.

The rule that the decision of a single judge sitting in equity will not be reversed on appeal unless clearly erroneous is confined to cases where the evidence is given orally and there is a conflict in the testimony. Where the evidence is documentary the full court on appeal receives the case in regard to questions of fact and inferences of fact to be drawn from the evidence in the same way that the single judge received it.

Where the evidence in a suit in equity coming by appeal to this court consisted of an agreement in writing of counsel as to certain facts, the articles of incorporation and the by-laws of one of the defendants, interrogatories to two other defendants and their answers thereto, certain checks and other documents, and the oral testimony of one witness, it was held, that the questions of fact except so far as covered by the testimony of the one witness were presented to this court as fresh questions unaffected by the decree from which the appeal was taken.

In this Commonwealth, when, before the repeal of R. L. c. 110, § 44, a payment of the capital stock of a corporation could not be made by the conveyance of property except in conformity with the terms of that section, if the corporation agreed to buy property from a subscriber for its stock at a value equal to the amount of his subscription, and the subscriber borrowed this amount of money from a bank and paid it to the corporation for the shares for which he had subscribed, and the corporation gave him its check in payment for the property it had agreed to buy from him and he conveyed the property to the corporation and repaid the money he had borrowed from the bank with the check of the corporation, this transaction, even if both parties acted in good faith and the property was worth the full amount paid for it, was not a payment in cash for the capital stock of the corporation within the meaning of the statute.

In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of certain officers of the corporation for its debts on the ground that they had signed a certificate which was required by law knowing it to be false, if it appears that the defendants signed a certificate that certain shares issued by the corporation were paid for in cash, that the shares in fact were paid for by a conveyance of property to the corporation made in a manner which the defendants were advised by a member of the bar was in effect a payment in cash, and that they in good faith acted under his advice in receiving the payment as officers of the corporation and in signing the certificate, the plaintiffs have failed to show that the certificate was known to the defendants to be false and cannot recover against them.

In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of certain officers of the corporation for its debts on the ground that they had signed a certificate which was required by law knowing it to be false, where the defence is that the defendants in signing the certificate in question acted in good faith under the advice of counsel, if it appears that the member of the bar who advised the defendants was a subscriber for two shares of the stock of the corporation which he had paid for in cash, this fact is immaterial and in no way tends to show that the member of the bar was incapacitated from giving the advice in question.

In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of the general manager and the treasurer of the corporation for its debts on the ground that they had signed a false certificate that the capital stock of the corporation was paid in in cash and was invested in the purchase of material, supplies, machinery, stock and labor, knowing it to be false, it appeared that the defendants had signed a certificate to the effect alleged, and that ten shares of the corporation stated in the certificate to have been paid for in cash were paid for in the following manner: The defendant general manager had induced a certain person to subscribe for the ten shares by agreeing that he or the defendant treasurer would arrange it so that the payment for the shares could be made by the subscriber giving a note to the company for the amount. In pursuance of this agreement the subscriber borrowed \$1,000 from a bank and gave it to the defendant general manager. On the next day the subscriber gave to the defendant general manager or the defendant treasurer his note for \$1,000 payable to the corporation and received from the corporation \$1,000, which he used in repaying the money borrowed by him from the bank. The subscriber's note was discounted by the corporation at the same bank to meet the check signed by the defendant treasurer which was used by the corporation in lending the subscriber the \$1,000. No certificate for the shares was issued to the subscriber until his note to the corporation had been

paid in full two years after it was received. The certificate alleged to be false was signed by the defendants while the note of the subscriber was held by the corporation and was unpaid. *Held*, that the ten shares were not paid for in cash but by a note in violation of the provision of R. L. c. 110, § 44, and that the capital stock was not invested in material or the other things named in the certificate, as \$1,000 of it was lent to the subscriber for the ten shares, and that both the defendant general manager and the defendant treasurer had knowledge of these facts when they signed the certificate in regard to the capital stock and were liable for the debts of the corporation under the terms of the statute.

In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of the general manager, the treasurer and the president of the corporation for its debts on the ground that they had signed a false certificate that the capital stock of the corporation was paid in in cash and was invested in the purchase of material, supplies, machinery, stock and labor, knowing it to be false, it appeared that the defendants had signed a certificate to the effect alleged and that ten shares of the capital stock had been paid for not in cash but by a note which remained unpaid for two years, and that the certificate was signed while the note was held by the corporation still unpaid so that the statements contained in the certificate were false, that the loan was made and the note was received in payment for the ten shares by the defendant general manager and the defendant treasurer without the knowledge of the defendant president, that the president was a director, that the by-laws of the corporation provided that no loan should be made without action by the directors, and that no vote of the directors authorizing the loan was put in evidence. *Held*, that it could not be assumed in the absence of evidence to that effect that the directors passed a vote authorizing the loan or that the defendant president acted recklessly in signing the certificate as to the capital stock; therefore that there was no evidence that when he signed the certificate he knew it to be false and he was not shown to be liable under the statute.

LORING, J. This is a bill brought by creditors of the Worcester Umbrella Company, a Massachusetts corporation, to enforce the alleged liability of three of its officers under R. L. c. 110, § 58, cl. 5,\* for signing a false certificate that the capital stock of the corporation was paid in in cash and invested, or voted to be invested, in the purchase of material, supplies, machinery, stock and labor. The case comes before us on an appeal from a decree dismissing the bill. The evidence at the hearing was taken by a commissioner, and special findings were made in the Superior Court.

It appears that a certificate of organization of the Umbrella Company was issued by the secretary of the Commonwealth on February 13, 1902. Before the organization of the corporation

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\* See now St. 1903, c. 437, § 34. The whole of R. L. c. 110 was repealed by St. 1903, c. 437, § 95, except so far as continued in accordance with § 96 of the same statute.

the defendant Jones had been carrying on the business of manufacturing umbrellas, under the name of the Jones Umbrella Company, and the defendant Howard, together with one Sisson, apparently had been carrying on practically the same business under the name of Howard and Sisson. For "some three or four months" before February 13, to use the words of the defendant Jones, the project of these two firms organizing a corporation to take their stock in trade had been under discussion; and as a result the corporation in question with a capital stock of \$20,000 was organized. The defendant Howard was elected treasurer, Jones general manager, and Duncan (the executor of whose will is the other defendant) president, and they respectively held these offices until after the matters here complained of. They also were and continued to be directors. On February 28, (fifteen days after the organization was complete,) a meeting of the directors of the corporation took place, all the directors including Howard, Jones and Duncan being present. Whether these three were all the directors did not appear. It then was voted to buy "the stock of goods of the Jones Umbrella Co. owned by Joseph A. Jones," for \$8,000; and "the same as to stock of the Worcester Umbrella Company, a copartnership consisting of A. H. Howard and W. B. Sisson, for the sum of \$1,700. The above stated amounts are the same as originally agreed when making up the corporation of Worcester Umbrella Co. on February 13, 1902."

On the adjournment of that meeting Jones and Howard the treasurer went to the First National Bank of Worcester. Jones borrowed of the bank \$8,000, receiving from the bank a check for \$8,000 which he handed to Howard as treasurer. Thereupon Howard handed him the check of the corporation for a like amount in exchange for an assignment of his stock in trade. The \$8,000 check of the corporation was paid by Jones to the bank in payment of the loan to him. At the same time Howard borrowed of the bank \$1,700, delivered to himself as treasurer the check which he received for that loan, and received from himself as treasurer a check on the same bank for \$1,700, in exchange for an assignment of the stock in trade owned by himself and Sisson, which check he paid to the bank in payment of the loan to himself.



It further appeared that the defendant Jones had induced one Conrad to subscribe to ten shares of the stock on the ground that he or Howard would arrange it so that the payment for them could be made by Conrad's giving a note to the company for the amount. In pursuance of this agreement Conrad, on the same February 28, borrowed \$1,000 from the same First National Bank of Worcester and gave the check which he received for it to Jones; on the next day he gave Jones or Howard his note for \$1,000, payable to the Umbrella Company on or before January 1, 1903, with interest at five per cent, and received from the company \$1,000, which he used in paying the loan made to him by the bank. Conrad's note was discounted at the bank to meet the check used by the company in paying Conrad the \$1,000 lent by it to him. It appeared that no certificate was issued to Conrad for his shares until his note to the corporation was paid in full, namely, on January 8, 1905.

On March 8, 1902, Duncan as president, Howard as treasurer, and Jones, being a majority of the directors, in compliance with R. L. c. 110, § 43, made oath to a certificate that "the whole amount of the capital stock of said corporation, namely, the sum of twenty thousand (20,000) dollars, has been paid in, in cash, and that the same has been invested, or voted by the corporation to be invested, as follows, viz.: In the purchase of material, supplies, machinery, stock and labor for the manufacture and sale of umbrellas," etc.

There is no evidence in the commissioner's report as to the value of the stock transferred to the corporation by Jones, or as to that transferred by Howard and Sisson.

The first defence set up by the defendants is that "When an appeal in equity from the decision of a single judge is heard by the whole court, on a report of all the evidence adduced at the original hearing, the decision of such judge, as to matters of fact, will not be reversed unless clearly erroneous," and they cite in support of this *Reed v. Reed*, 114 Mass. 372; *Montgomery v. Pickering*, 116 Mass. 227, 230; *Newton v. Baker*, 125 Mass. 30, 32, 33; *Brown v. Brown*, 174 Mass. 197, 198. That rule depends upon the fact that where the evidence is given orally and there is a conflict in the testimony, the judge who saw the witnesses has a better opportunity of deciding between them. *Loud v. Barnes*,

154 Mass. 344, 345. *Olivieri v. Atkinson*, 168 Mass. 28, 30. *Dickinson v. Todd*, 172 Mass. 183, 184. *Shapira v. D'Arcy*, 180 Mass. 377, 379. *Skehill v. Abbott*, 184 Mass. 145, 147. *Colbert v. Moore*, 185 Mass. 227, 228. It is to be confined to such cases, and does not apply to cases where the evidence is documentary and the appellate court stands where the judge who heard the case stood in respect to the inferences of fact to be drawn from the evidence. See in this connection *Chase v. Hubbard*, 153 Mass. 91; *Poland v. Beal*, 192 Mass. 559. In the case at bar, the evidence before the Superior Court introduced by the plaintiffs consisted of an agreement of counsel as to the indebtedness due to the plaintiffs, the written agreement of association of the Umbrella Company, interrogatories to the defendant Howard and his answers, interrogatories to the defendant Jones and his answers, the several checks, the deposition of Conrad, the by-laws of the Umbrella Company, and certified copies of the payment of the capital stock of two other corporations signed by Jones and Howard respectively, among other persons. The evidence introduced by the defendant consisted of the oral testimony of a member of the bar.

The questions of fact in the case at bar stand before this court on appeal as they stood before the judge of the Superior Court, except so far as they are covered by the oral testimony of the member of the bar, of which we shall speak hereafter.

The statements sworn to by the three officers of the Umbrella Company in the certificate of payment of the capital stock were not true in three particulars: (First) it was not true that the \$8,000 subscribed by Jones and the \$1,700 subscribed by Howard and Sisson were paid for in cash; (second) it was not true that the \$1,000 subscribed by Conrad was paid in cash; and (third) it was not true that all the capital stock was invested or voted by the corporation to be invested "in the purchase of material, supplies, machinery, stock and labor for the manufacture and sale of umbrellas," etc., but to the amount of \$1,000 the capital stock was then invested in a note of Conrad.

When we say that it is not true that Jones's subscription for eighty shares and Howard and Sisson's subscription for seventeen of the twenty subscribed for by them were not paid in cash, we do not forget what was decided in *Breck v. Barney*, 183 Mass.

183, namely, that if A. owes B. and B. owes A., and they meet and set one debt against the other, there is a payment by A. to B. and a payment by B. to A. Nor do we forget that under this principle it has been held in England under St. 30 & 31 Vict. c. 131, § 25, requiring that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash," there is a payment in cash in such a transaction as that now under consideration, if entered into in good faith. The cases to that effect in England are collected in *Breck v. Barney*, 183 Mass. 133, 136, 137. But the statute under which the Umbrella Company was organized is not like St. 30 & 31 Vict. c. 131. It is provided in R. L. c. 110, § 44, that if the capital is to be paid by a conveyance to the corporation of real or personal property, a statement must be filed with the secretary of the Commonwealth setting forth the property conveyed in such detail as is satisfactory to the commissioner of corporations and indorsed with a certificate signed by him that he is satisfied that the valuation put upon that property is a fair and reasonable one. Under a statute where there is no provision regulating the payment of shares by a conveyance of property the English rule cannot well be avoided. But where payment of capital stock by a conveyance of property is regulated as it is in R. L. c. 110, § 44, the provisions of the statute must be complied with. To undertake to carry such a payment through by passing checks, as in the case at bar, is an evasion of the requirements of the statute.

The defendants' next contention is that they acted under the advice of counsel in the payment of the capital stock and in swearing to this certificate. The testimony of the member of the bar is not explicit on this point. We adopt however the construction put upon it by the judge of the Superior Court, and interpret it to mean that he did advise them that in his opinion the shares subscribed for by Jones, Howard and Sisson had been paid for in cash. The plaintiffs have asked us to hold these defendants liable in spite of this advice. In making that contention they rely on *Commonwealth v. Bradford*, 9 Met. 268, and *Commonwealth v. Connelly*, 163 Mass. 539, 543, upon the testimony of both Howard and Jones in the bankruptcy court, (in which they said that \$10,300 of the capital stock was paid for in

cash and the balance in goods at a valuation,) and upon a certificate signed by Howard as treasurer of the Howard Brothers Manufacturing Company and one signed by Duncan as president of the Duncan and Goodell Company, as to the payment of the capital stock in those corporations. In each of those two corporations the capital stock, or a part of it, was paid for by a conveyance of property. The statutory requirements as to payment of capital by a conveyance of property are stated in the certificates to have been complied with. But these defendants may have understood from counsel's advice that such a case could be dealt with in either way, and we are of opinion that in respect to those matters the plaintiffs have not proved that the certificate was known by the defendants to be false. The case comes within *International Paper Co. v. Gazette Co.* 182 Mass. 578. There is nothing in the plaintiffs' suggestion that the member of the bar was incapacitated from giving advice by the fact that he subscribed and paid in cash for two shares in the capital stock.

Conrad's stock was not paid for in cash. R. L. c. 110, § 44, provides that "no note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock." There is no more a payment in cash where the corporation receives cash one day and lends the cash received to the stockholder the next day than where it receives a note originally in payment of a stock subscription.

The member of the bar testified that he knew nothing whatever about the note from Conrad until after it was given, that he never was asked and never advised any one in reference to taking that note. That defence therefore fails so far as the Conrad note was concerned.

Did Jones, Howard and Duncan have knowledge of the fact that the \$1,000 paid in by Conrad had been returned to him by way of a loan?

Jones had knowledge of this. Both he and Conrad testified that he, Jones, made the promise that this should be done to induce him, Conrad, to subscribe to the stock; and that he, Jones, took part in carrying that promise into effect.

Howard knew this. In the first place, it was his duty under the by-laws to receive the note, and he in fact signed the check

for the money lent Conrad on the note. More than that, he testified to the whole arrangement in the bankruptcy proceedings, and admitted in this suit that the facts so testified to were true. It is not entirely clear that he was testifying to facts known by him before signing the certificate. But this testimony, taken in connection with the fact that he signed the check for the money lent Conrad, fixes knowledge on him. He knew also that the statement that the capital stock was, or was voted to be, invested in material, supplies, etc. was not true. He knew that as treasurer of the corporation he had given Conrad a check for \$1,000 of the capital stock money lent by the corporation to Conrad. Counsel have attempted to escape from this by arguing that the investment of capital referred to in the certificate refers to February 28, when the payment of capital stock was made, and not to March 8, 1902, when the certificate was signed. That is not so.

So far as the defendants Jones and Howard are concerned the case comes within *Heard v. Pictorial Press*, 182 Mass. 530.

The plaintiffs however have failed to fix knowledge of the Conrad note upon Duncan. The only evidence tending to fix knowledge upon him is the fact that under the by-laws no loan can be made without action by the directors. The directors' vote for the purchase of stock in trade from Jones and Howard and Sisson was in evidence. No vote by the directors for this loan was put in evidence. We cannot assume that one was passed, and if Duncan was in fact ignorant of the loan made by Jones and Howard, he cannot be held on the ground that he acted recklessly in making the oath under the doctrine of *Nash v. Minnesota Title Ins. Co.* 163 Mass. 574. There is no evidence of that fact.

The entry must be

*Decree affirmed as against the defendant trust company as it is the executor of the will of Duncan.*

*Decree as against the defendants Jones and Howard reversed. Decree for the plaintiffs against those defendants.*

*W. R. Bigelow*, for the plaintiffs.

*E. H. Vaughan*, (*J. Clark, Jr.* & *H. F. Harris* with him,) for the defendants.

## JAMES H. FARRIGAN vs. HENRY A. PEVEAR &amp; others.

Worcester. October 1, 1906. — October 22, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, &amp; RUGG, JJ.

*Charity. Negligence.*

A trust to maintain an unincorporated institution called a home for the sole purpose of affording free education and maintenance for deserving and destitute boys is a valid public charity.

The trustees of an unincorporated home maintained for the free education and maintenance of deserving and indigent boys if they have used reasonable care in the selection of their servants are not liable for injuries caused by the negligence of such servants.

TORT for personal injuries sustained while in the employ of the defendants, the first count alleging that the defendants put the plaintiff to work in an unsafe and dangerous place, and that the defendants knew, or in the exercise of reasonable care might have known, that the place was unsafe and dangerous; the second count making the same allegations and describing the place of danger as a pump pit or well hole in an engine room on the defendants' premises, in close proximity to the exhaust pipe from a gasoline engine from which noxious gases escaped into the pit, and alleging that the plaintiff while at work for the defendants entered the pit by direction of the defendants' agents and was injured by the gases; and the third count alleging failure on the part of the defendants to notify the plaintiff of a danger known to them. Writ dated June 16, 1904.

The answer, in addition to a general denial, alleged that the defendants were trustees of a public charitable institution, and that as individuals they had no interest in the premises where the plaintiff was injured.

In the Superior Court the case was tried before *Pierce, J.* The plaintiff in his opening, in answer to a question from the judge as to the special defence set up in the answer, admitted that the defendants were the trustees, and as such the managers and directors of the Stetson Home, an institution, not incorporated, situated in the town of Barre in the county of Worcester,

and so called in memory of the mother of one of the defendants, who was himself the founder and chief benefactor of the institution, which was established and is maintained under a perpetual trust solely for the free and gratuitous education and maintenance of deserving and indigent boys, the entire property and income of the institution being held by the trustees in perpetual trust for that purpose, there being no dividend, profit or emolument whatsoever derived therefrom by or for any of the defendants or any other person.

The plaintiff further admitted that none of the defendants was present when the accident occurred or had knowledge of the incidents or conditions attending the time, place or occasion of the alleged injury to the plaintiff, nor did any of the defendants give, or have knowledge of the giving of any orders or directions by the defendants' agents to the plaintiff in the premises, nor have any participation in or knowledge of the work in which the plaintiff alleged that he was engaged at the time of his injury.

The plaintiff further admitted that there was no personal negligence of the defendants or any of them in the premises "attributable as the proximate cause of the plaintiff's alleged injury," and that if there was any negligence in the premises, causing the alleged injury to the plaintiff, it was that of servants and agents of the defendants, as such trustees, acting in the absence of the defendants and without their knowledge or direction.

The judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

*G. S. Taft*, for the plaintiff.

*G. A. Gaskill*, for the defendants.

BRALEY, J. The Stetson Home, of which the defendants are trustees, was founded and is maintained under a trust created by gift for the sole purpose of affording an education and maintenance for destitute boys, and whatever advantages the institution offers are conferred without compensation. These distinctive features are ample to bring the home, even if unincorporated, within that class of benevolent institutions whose sole purpose is to furnish relief to destitute and deserving people, and therefore constitutes a valid public charity. *Bartlett v. Nye*, 4 Met.

378, 380. *Odell v. Odell*, 10 Allen, 1, 4. *Jackson v. Phillips*, 14 Allen, 539. *Sherman v. Congregational Home Missionary Society*, 176 Mass. 349. *Minot v. Attorney General*, 189 Mass. 176, 179.

At the outset it may be said that the case of *Davis v. Central Congregational Society*, 129 Mass. 367, on which the plaintiff relies, and that of *Smethurst v. Barton Square Church*, 148 Mass. 261, are not authorities in his favor, as in those cases the question of the liability of a public charity for the negligence of its servants or agents does not appear to have been raised or decided. See *Minns v. Billings*, 188 Mass. 126; *Osgood v. Rogers*, 186 Mass. 238, 240. Compare *Chapin v. Holyoke Young Men's Christian Association*, 165 Mass. 280, and *Donnelly v. Boston Catholic Cemetery Association*, 146 Mass. 163.

Under the authority of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, if the home had been incorporated the plaintiff could not have maintained this action against it, for such a corporation was held in that case not to be liable for the negligence of its servants properly selected when acting in the performance of their prescribed duties. See also *Benton v. Boston City Hospital*, 140 Mass. 18. Among the reasons given for this exemption it has been said, that being a charitable institution rendering services to the public without pecuniary profit, if the property of the charity was depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charitable gifts discouraged; or that if an individual accepts the benefit of a public charity he thereby enters into a relation which exempts his benefactor from liability for the negligence of servants who are employed in its administration, provided due care has been used in their selection. *McDonald v. Massachusetts General Hospital*, *ubi supra*. *Perry v. House of Refuge*, 68 Md. 20. *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251. *Fire Insurance Patrol v. Boyd*, 120 Penn. St. 624. *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. Rep. 294, 303. But whatever grounds may have been stated in support of these and other decisions which have held public charities exempt from actions caused by the negligence of attendants or servants, such an exemption may well rest upon



the application of the rule of law which makes the principal accountable for the acts of his servant or agent. Accordingly the true inquiry is whether this rule applies to the defendants. They are not shown to have selected incompetent servants, and are conceded not only to have been ignorant of the conditions which caused the alleged injury, but to have given to the plaintiff no instructions; nor can there be imputed to them knowledge in fact of any order given by their agents to him.

By the case of *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, following the decision in the leading case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, it was decided that there was no distinction as to liability for the negligence of servants whether they were employed by a corporation established for a public purpose, or by a private person or corporation. This doctrine was approved and followed in the cases of *Glavin v. Rhode Island Hospital*, 12 R. I. 411, and of *Donaldson v. General Public Hospital*, 30 N. B. 279, where a public charity was held liable in tort for damages suffered by patients from the negligence of servants, though subsequently, by the Pub. Laws of R. I. (1880) c. 802, such institutions in that State are now exempt from this measure of liability. The plaintiff's argument in effect asks us to follow the last two cases, which have been decided since our former decision in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432. But in this Commonwealth the rule of liability enunciated by the principal case has not been so broadly applied, and neither cities and towns in the performance of authorized municipal acts independently of certain exceptions defined by our decisions, nor public officers, although liable in damages for personal acts of negligence which cause injury to the persons or property of others when discharging the duties of their office, are held liable for the misfeasance of their servants. *Hill v. Boston*, 122 Mass. 344. *Tindley v. Salem*, 137 Mass. 171. *Benton v. Boston City Hospital*, *ubi supra*. *Rome v. Worcester*, 188 Mass. 307. *Dickinson v. Boston*, 188 Mass. 595, 599, and cases cited. *Moynihah v. Todd*, 188 Mass. 301, 304-306, and cases cited. *Huley v. Boston*, 191 Mass. 291, 292. See also 2 Dill. Mun. Corp. (4th ed.) § 974. The reason for this rule is, that acting for the benefit of the public solely in representing a public interest, whether by a municipality or by a public officer,

does not involve such a private pecuniary interest as lies at the foundation of the doctrine of *respondeat superior*. While such officers may well be held liable for their personal negligence it would be unreasonable and harsh to hold them responsible for the negligence of their servants or agents.

There would seem to be in principle no sound distinction between an action for negligence by which personal injuries have been received, directly instituted against the charity by the person injured, where its corporate form renders such procedure possible or expedient, and the present case. The object of the charity is the same whether administered by trustees elected by a corporation, or selected and appointed under a deed of gift; and even if the terms of the settlement are not referred to in the exceptions, the trust is stated to be perpetual, and if so its provisions can be enforced in equity. Under either form of administration those who administer the trust act essentially in a representative and not in a private capacity, and such trustees are not within the rule which holds the master liable, because, as we have said, where that rule applies the servant is acting, not only under his orders but also for his benefit, and in the furtherance of the master's business. / *Farwell v. Boston & Worcester Railroad*, 4 Met. 49, 55.

In no correct or just sense can it be said that the defendants were conducting a business, or engaged in an enterprise, from which they received or could expect to derive any monetary advantage or private emolument. They were serving without compensation in the supervision of a home for indigent boys, which was established for the purpose of enabling them to become self-supporting and efficient members of society. Their duty to the plaintiff in the exercise of this function did not extend beyond the requirement of using reasonable care to select competent servants, and the demands of substantial justice are met if as charitable trustees they are not charged with the negligence of those so employed. / *McDonald v. Massachusetts General Hospital*, *ubi supra*.

We are not unmindful that the remedy which the plaintiff may have against a fellow servant for the negligence, if any, which caused the accident may be wholly theoretical and of little practical value, yet we deem it to be in accord, not only

with our own decisions but with the weight of authority, to decide that the present action cannot be maintained, and that the ruling directing a verdict for the defendants was right. *Heriot's Hospital v. Ross*, 12 Cl. & F. 507. *Powers v. Massachusetts Homœopathic Hospital*, *ubi supra*. *Perry v. House of Refuge*, *ubi supra*. *Williamson v. Louisville Industrial School of Reform*, *ubi supra*. *Fire Insurance Patrol v. Boyd*, *ubi supra*. *Van Tassell v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620; 621, and note. *Joel v. Woman's Hospital*, 35 N. Y. Supp. 37. *Downes v. Harper Hospital*, 101 Mich. 555. *Pepke v. Grace Hospital*, 130 Mich. 493. *Hearns v. Waterbury Hospital*, 66 Conn. 98. *Eighty v. Union Pacific Railway*, 98 Iowa, 588. *Union Pacific Railway v. Artist*, 60 Fed. Rep. 865.

*Exceptions overruled.*

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### ORLANDO MASON & others vs. BAXTER D. WHITNEY.

Worcester. October 1, 1906. — October 31, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, & RUGG, JJ.

*Watercourse. Mill Privileges and Water Rights.*

A custom or usage in the use of the waters of a river by the proprietor of a mill privilege and by the proprietors of other mill privileges below him on the stream, which has existed more than twenty years but never has been adverse and has created no rights by prescription, does not affect the rights of the respective proprietors to the use of the waters as against each other.

It is not unreasonable for the proprietor of a mill privilege upon a river, as against the proprietors of other mill privileges below him on the stream, to use the water of the stream in his legitimate business at night as well as by day so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day.

The fact that the water of a stream comes to a riparian proprietor changed as to the hours of its accumulation and discharge in a way that would be beneficial to a riparian proprietor below him on the stream does not give such lower proprietor a right to more than the natural flow of the stream, and it is not unreasonable for the upper proprietor, even if the water above him is used only in the day-time, to use a part of it in his business in the night-time, provided he leaves as much as the regular flow of the stream to pass unaffected by his use at all times during the business hours of the day.

In determining whether the use of the waters of a stream by the proprietor of a

mill privilege is reasonable as against a proprietor below him on the stream, it is proper to consider the fact that he has a large reservoir on a tributary of the stream some miles above which he maintains and uses in connection with his mill as affecting the natural flow of the stream to the proprietor below, the part of the use of the stream and reservoir which is detrimental and that part which is beneficial to the proprietor below being taken together to show how far the upper proprietor can go in his use of the water.

**BILL IN EQUITY**, filed July 5, 1899, by the proprietors of mills and mill privileges on a natural watercourse called Millers River flowing through the town of Winchendon, against the proprietor of mill privileges and mills appurtenant thereto above them on the stream, to restrain the defendant from preventing the permanent flow of the water of that watercourse and the reservoirs thereof from passing to the several mill privileges or mills of the plaintiffs in the natural, ordinary and customary manner and extent during the usual working hours of the daytime of each day; to restrain the defendant from interfering with or preventing the natural, ordinary and customary flow of the waters of the watercourse during the usual working hours of the daytime of each day; to restrain the defendant from causing or permitting the waters of the watercourse to flow through the gates of the defendant's mills in the night-time, and from using the waters in the night-time in any manner that should in any wise prevent the waters from flowing in the customary, usual and natural manner and extent during the working hours of the daytime of each day; with prayers also for the assessment of damages and for further relief.

In the Superior Court *Richardson, J.* made a final decree granting an injunction and giving damages to the several plaintiffs. The defendant appealed.

*T. H. Gage, Jr.*, (*F. F. Dresser* with him,) for the defendant.

*H. Parker*, (*G. A. Gaskill* with him,) for the plaintiffs.

**KNOWLTON, C. J.** On Millers River in the town of Winchendon, within a distance of less than two miles, are six mill privileges, each occupied for manufacturing purposes. Altogether they have a head and fall for the use of water power on their several wheels, which amounts to ninety-eight and one half feet. The defendant owns the upper privilege, each of the parties plaintiff owns one of the others, and one is owned by persons who are not connected with this suit. The defendant's mills

are near the head of the valley. They have a fall of twenty feet, with a mill pond covering one hundred and ten acres, containing five million cubic feet of water for one foot in depth of the pond, this being something more than the entire flow of the stream for twenty-four hours. The mills have been used since 1846, in part for a machine shop, and in part as a cotton factory, and lately as a machine shop and a power house to furnish electricity to light the town of Winchendon. The mills of the several plaintiffs have been used still longer for different kinds of manufacturing. The valley is narrow, and descends rapidly from the defendant's mills to the westward. "The plaintiffs' mills have no substantial storage capacity in the respective mill ponds. It is only sufficient for from two to four hours' use when there is no inflow." The defendant maintains and uses, in connection with his mill, a large reservoir some miles up the stream on one of its branches, and the mill owner next above him maintains and uses two other reservoirs above his pond on the other branch of the stream. The master finds and the plaintiffs concede, what is clear upon the evidence, that no one of the parties has acquired any rights by prescription. The defendant's use of the water at his mills has always been such as he has found most convenient for his own purposes, and there is no foundation for a claim of use adverse to him.

For a long time previous to June, 1899, the usual hours for operating all of these establishments were from 7 A. M. to 6 P. M., with an hour's interval at noon. At an earlier period the mills ran eleven hours, and in all the years, from time to time when business was pressing, they were operated overtime during a part of the hours of the night. Since June, 1899, the defendant has used one of his two wheels ten hours per day for his machine shop, and the other, for a considerable part of each night, in producing electricity for lighting the town of Winchendon. From lack of storage capacity in their ponds, much of the water used for this latter purpose has not been utilized by the plaintiffs, and they have not been able to have the entire flow of the stream for twenty-four hours come to their wheels during the ten hours which constitute their ordinary working day. This bill is brought to recover for their loss, and to obtain an injunction against a continuance by the defendant of this use.

The plaintiffs proceed upon the theory that, because of the custom and usage of mill owners on this stream, even though no prescriptive rights have been acquired, they are legally entitled to have the water come down from the defendant's mills in such a way that, without mill ponds of their own sufficient to retain any considerable amount of water, they can use the whole flow of the stream for a day of twenty-four hours during the ten hours of the day in which they find it convenient to operate their machinery. The master has adopted this theory. The defendant made many requests for rulings in matters of law, touching this subject, which were refused or modified by the master. The defendant's requests for a ruling that the natural flow of the stream may be used "in any reasonable manner required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size of the stream," the master gave with the qualification that, "in the case of ancient mills, dependent on a flow which has been established by custom and use and the wants of the community, the upper proprietor must exercise his right to the use of the water with a just regard to the like reasonable use of it by the proprietors of mills immediately below, as those rights have been established by custom and usage and the wants of the community." The fifth request was that, "so long as an upper proprietor uses the water in a reasonable and lawful manner and in a way best fitted to his needs and necessities, he does not by such mere user lose any rights by prescription, and can, if a change in user becomes advantageous to him, alter and modify his user so long as he does not impair thereby the natural flow of the stream." This the master modified by inserting after the word "necessities" the words "and in the absence of any acquired right in the lower proprietors arising out of long established custom and usage and the wants of the community," and by adding, at the end, the words, "unless the flow has been established by long custom and usage." The thirteenth request was as follows: "If the plaintiffs have any rights in the defendant's user other than the rights common to all riparian proprietors they must show that such rights have been gained by prescription." To this the master added the words, "or by custom and usage extending over more than twenty years. The nature of

the custom and usage established in this case appears in the body of the report." In reference to the eighteenth request the master says, "I have based my findings on a custom and usage adopted and carried out for many years by both the plaintiffs and the defendant." In dealing with other requests, and in other parts of his report, the master refers to an established custom and usage of the plaintiffs and the defendant, in their use of this stream, which has changed the rights common to riparian proprietors upon similar streams, and limited the rights which the defendant would otherwise have to a use of the water for power. This, too, when it is found and conceded that no rights have been acquired or lost by prescription. The application of the law by the master is such that the plaintiffs are now held entitled, as against the defendant, to have his mill and pond and reservoir so managed that the entire flow of the river for the twenty-four hours shall come to their mills during the ten hours of the day when they wish to run their wheels, while if it were not for the dams and reservoirs of the defendant and another proprietor farther up the stream, the water would flow regularly night and day, so that, during the fourteen hours of each day when their mills are not running, the plaintiffs would lose much of the flow from lack of storage capacity in their ponds. The result would be that, without having acquired any prescriptive rights, the plaintiffs could compel these upper proprietors to interrupt the natural flow of the stream every day, and retain the water until the time when the plaintiffs wished to use it.

This is a mistaken view of the law. In the absence of any prescriptive rights, the plaintiffs have no greater right against the defendant, in reference to his use of the stream, than they would have if his mills and dams and reservoir and their mills and dams had been built and used but a single month. In the latter case each would have a right to a reasonable use of the water. In determining what is reasonable for each of the parties, the nature of the stream and of the several mill privileges, its adaptability to different modes of use, the wants of the community, the custom and usage of people in the neighborhood and elsewhere in regard to the management of business, the hours of labor and the use of the water of such streams, would all be proper matters for consideration as evidence. *Tourtellot*

v. *Phelps*, 4 Gray, 370. *Gould v. Boston Duck Co.* 13 Gray, 442, 451, 453. *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396. *Hazard Powder Co. v. Somersville Manuf. Co.* 78 Conn. 171. In the absence of rights by prescription, the only difference in the determination of such a question, between a case when the mills are all new and a case when the mills have all been running sixty years, is that, in dealing with old mills the evidence of custom and usage as to hours of labor or the methods of doing business, which in either case would include the practice of the whole community in such matters, would be enlarged by taking in, with the rest, the practice of the half dozen owners on this stream. So far as it concerns the issue in this case, there is nothing to indicate that, for the last fifty years, there has been anything different in the experience of these men from that of men and property owners generally, engaged in like pursuits. So, upon custom and usage, the material evidence would doubtless be substantially the same if the mills were new as it is now. If the plaintiffs have enjoyed gratuitously the benefit of the defendant's dam and reservoir for the storage of water for their wheels, that is not a circumstance which gives them a right to have it in like manner in the future, or which deprives him of the right to use the stream now as he could use it if his works on the stream were all new. Nor does it make it less reasonable for him to use the water now according to his interest.

So, too, the rights of these plaintiffs are not enlarged by their suing jointly. The question as to each is whether the defendant is using the water unreasonably to his detriment. If the defendant were not using it at all — if he and one or two proprietors farther up should abandon their mills and take away their dams and open their reservoirs, so that the water would come down to the plaintiffs' mills in its natural flow, in the same quantity in all parts of each day of twenty-four hours — it seems very plain that the plaintiffs would have no legal ground of complaint, although they would be able to use on their wheels, during each working day of ten hours, very much less water than they use now.

The question of chief difficulty in the case is: How far is it reasonable for a mill owner on such a stream to use the water in the night-time, for a legitimate business which calls for power



during that part of the day, although in most kinds of business power is used not more than ten hours in a day? It is a familiar fact that certain industries cannot be conducted profitably without a use of power in the night-time. This is true of paper manufacturing, which is an important industry in Massachusetts, of producing electricity for lighting and for the use of street railways, of powder manufacturing and of some other kinds of business. All kinds of legitimate business are alike entitled to the protection of the law. This is recognized in the cases which show a use of water power in the night-time, to the detriment of proprietors who wish to use it only in the daytime. *Barrett v. Parsons*, 10 Cush. 367. *Bullard v. Saratoga Victory Manuf. Co.* 77 N. Y. 525. *Keeney & Wood Manuf. Co. v. Union Manuf. Co.* 39 Conn. 576. *Hazard Powder Co. v. Somerville Manuf. Co.* 78 Conn. 171.

The primary right of every riparian proprietor is to have the natural and customary flow of the stream, without obstruction or change. This primary right is modified by the right of every proprietor to make a reasonable use of the water, which leaves the lower proprietor the natural flow, changed, so far as it may be, by such previous use on the stream above. If such use makes the flow more advantageous for the lower proprietor than the flow in its strictly natural state, he gets the benefit of it, as an incident of his ownership, which he may enjoy while it lasts, but not as permanent property that he can control for the future. The fact that a reasonable use by an upper proprietor leaves the flow more beneficial than the strictly natural flow to those on the stream below, may well be considered as a circumstance, so long as the condition remains, in determining what is a reasonable use for an intermediate proprietor, in reference to those farther down. In this way a reservoir, reasonably constructed and used in connection with a stream, may so far affect the stream below as properly to be taken into account in passing upon the conduct of lower riparian proprietors.

We have been referred to no adjudication, and after searching we have found none, that determines how far a proprietor, under a claim of a reasonable use, may change the natural flow of a stream by appropriating its waters in the night-time and holding them back in the daytime. In *Barrett v. Parsons*, 10 Cush.

367, 372, the judge left to the jury the question, whether the defendant had "used the water in a reasonable and proper manner, for the regular prosecution of his business," or "had used it unreasonably, wantonly, and unnecessarily, by running his mill at unusual and unreasonable hours, and holding back the water, and letting it down to the plaintiffs' works at improper times of the day and night, so that the plaintiffs were thereby deprived of the reasonable, ordinary, and proper use of their mills." The defendant had used his grist mill a great deal in the night-time, and had let down to the plaintiffs but little water in the daytime. A detention of water in the night-time and an increased use of it in the daytime have often been held to be reasonable, even when they affected unfavorably a particular proprietor below. This is because such use is in accordance with the usual and convenient method of transacting most kinds of manufacturing business. But reversing the method would be detrimental to the interests of most lower riparian proprietors. In all the five cases last above cited, the decision was adverse to the contention of mill owners that they could lawfully change the natural flow of a stream by using the water at night and holding it back in the daytime, to the damage of owners below. But we are of opinion that it is not unreasonable for a mill owner, if his interest requires it, to use the water of his stream in his business at night as well as by day, so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day. If an upper proprietor maintains, for his own purposes, a reservoir for the storage of water that falls in the wet season, to be let down into the stream in times of low water, and in such times increases the flow by letting down water, the additional quantity that so comes each day may be treated as a part of the natural flow for the twenty-four hours, in determining the rights of a lower mill owner in reference to the use of other mill owners farther down the stream. But the mill owner ought not to be under an obligation, against his own interest, to hold back water in the night-time in order to enable his neighbor below to use it more profitably the next day. The lower proprietor is "entitled only to the natural flow, not to an intermittent flow." *Weare v. Chase*, 93 Maine, 264, 269. We think this too plain for doubt where the stream comes

to the upper proprietor with its strictly natural flow unchanged by any use above. If there is a use above which usually sends down to him most of the water in the daytime, the subject takes on difficulties. Does reasonable conduct require him to forego his own interest, in order to give the proprietor below something better than the natural flow of the stream, because it comes to him changed, in a way that would be beneficial to the lower proprietor? The general statement of the law in the decisions indicates that, in the absence of special rights acquired by grant or prescription, a riparian proprietor is entitled to nothing more or better than the natural flow of the stream. If he wishes to use all the water during a part of the day, he may provide for himself storage, or otherwise adapt his works to the conditions. We are of opinion that it is not unreasonable for a mill owner, even if the water above him is all used in the daytime, to use a part of it in his business in the night-time, provided he leaves as much as the regular, natural flow of the stream, unaffected by use, to pass by at all times during the ordinary business hours of the day. We do not say, as a matter of law, that there may not be conditions which would make it reasonable to increase or diminish such a use in the night-time. But under the conditions that appear in this case, we think this a correct statement of what is reasonable between the parties.

Inasmuch as the use of the defendant's reservoir on the stream above is a part of his use of the stream at his mills for his own convenience, we think his entire use at the mills and at the reservoir should be considered together, in its effect upon the natural flow to the plaintiffs below, in determining the limits of the defendant's rights. That part of his use which is detrimental and that part which is beneficial to the plaintiffs, when taken together, will show how far he can go in the use of the water without invading their rights. *Elliot v. Fitchburg Railroad*, 10 Cush. 191, 197.

It is unnecessary to consider in detail the numerous exceptions that were taken. The principles above stated will enable the parties to determinate their rights.

*Decree reversed; case to stand for further hearing.*

JAMES F. CAREY vs. MILFORD AND UXBRIDGE STREET  
RAILWAY COMPANY.

Worcester. October 2, 1906. — November 19, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

If a horse attached to a grocer's wagon is slow and of a quiet disposition and not afraid of electric cars and has been used for four or five months in delivering groceries from house to house without being hitched by a weight or otherwise when left by his driver and never has started without his driver, and if the driver leaves this horse standing unhitched on a street, along one side of which electric cars run, in front of a house at which the horse has been accustomed to stand while groceries were being delivered and goes into the house to deliver groceries, and if after being absent only a minute he returns and finds the horse and wagon gone, in an action by the owner of the horse and wagon against the street railway company operating cars on the street for the killing of the horse and the injury to his wagon and harness caused by their being run into by a car of the defendant while the horse was without a driver, the question whether the plaintiff's servant was in the exercise of due care in leaving the horse unhitched while he went into the house is for the jury.

In an action by a grocer against a street railway company for the killing of the plaintiff's horse and injuries to his wagon and harness from being run into by a car of the defendant while the horse was astray without a driver and was proceeding on the track toward the car on a winter evening after dark, if it appears that the plaintiff's driver got on the car and immediately informed the conductor that his horse and wagon were astray and might get on the track, and if the conductor testifies that "he thought it his duty to notify the motorman, and had started in just as the accident occurred," that he thought that he could walk the length of the car, which was only forty feet long, in half a minute if he had a clear aisle and that he had a clear aisle that night, and in another part of his testimony says that it was about a minute and a half after he was told before the horse was struck, and there is other testimony that the car went about a quarter of a mile after the driver got on before the accident happened, the question whether the conductor was negligent in failing promptly to inform the motorman of the danger after he was told of it himself is for the jury.

TORT for the killing of the plaintiff's horse and injury to his wagon and harness and the contents of the wagon from being run into by a car of the defendant at a place called Braggville between the towns of Milford and Holliston, as the defendant's car was going from Milford toward Framingham about seven o'clock in the evening of December 8, 1904. Writ dated December 17, 1904.

In the Superior Court the case was tried before *Pierce, J.* The driver employed by the plaintiff had left the team unhitched in the highway in which the defendant's track runs while he went into a house to deliver groceries. Upon his return the horse had gone, and it afterwards was struck while proceeding up the track toward an approaching car at a substantial distance from the place where the team had been left. The track of the defendant at the place where the team was left and also at the place of the accident runs on the side of the highway outside the general travelled path of the road.

The material evidence is described sufficiently in the opinion. At the close of the evidence, the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover, and that the jury must find for the defendant. The judge refused to rule as requested and submitted the case to the jury.

The jury returned a verdict for the plaintiff in the sum of \$293.20; and the defendant alleged exceptions.

*J. C. F. Wheelock*, for the defendant.

*J. B. Ratigan*, (*J. E. Swift* with him,) for the plaintiff.

KNOWLTON, C. J. This case may be divided into two parts, the first relating to the conduct of the plaintiff's driver in leaving his horse unfastened while he went into a house to deliver groceries, and the second to the conduct of the defendant's conductor in failing to inform the motorman that there was a horse and wagon astray upon the street, with which there might be danger of collision.

We cannot say, as a matter of law, that the driver was negligent in momentarily leaving the horse unhitched while he went into the house to deliver groceries. Ordinarily it is negligent to leave a horse and wagon unhitched and unattended upon a public street. But there are some horses which can be so left for a short time, under some conditions, without negligence. The horse in this case was a large, slow animal, of quiet disposition, which had been used by the plaintiff four or five months in delivering groceries from house to house. It had been the custom to leave her without fastening her or using a weight, and both the plaintiff and his driver testified that they had never known her to go away alone before. The house where she was left on this occasion was one at which she had been accustomed

to stand while goods were being delivered. She was not at all afraid of electric cars. The driver testified that he was absent only about a minute before he came out from the house and found the horse and wagon gone. The case is like *Southworth v. Old Colony & Newport Railway*, 105 Mass. 342, 344, in which a similar question was held to have been rightly left to the jury. It is different from *Stacey v. Haverhill, Georgetown & Danvers Street Railway*, 191 Mass. 326, in which it appeared that the horse was sometimes fastened with a weight, but on this occasion was left alone ten minutes, in a place where there was a temptation to graze, and wandered away to indulge his natural propensity.

The defendant contends that there was no evidence of negligence on the part of either of its servants. The accident happened at about seven o'clock in the evening of December 8. The night was rather dark, and the motorman had no reason to expect the approach of a stray horse and wagon on the track. But if we assume, in favor of the defendant, that the jury would not have been warranted in finding the motorman negligent, it was proved beyond dispute that, quickly after the plaintiff's driver got upon the car, he made the conductor understand that his horse and wagon were astray, and that there might be danger of encountering them. The conductor testified that "he thought it his duty to notify the motorman, and had started in just as the accident occurred." The car was only forty feet long, and he testified that he thought he could walk the length of the car in half a minute if he had a clear aisle, and that he had a clear aisle that night. In one part of his testimony he said that it was about a minute and a half after he was told before the horse was struck, and there was other testimony that the car went about a quarter of a mile after the driver got on, before the accident. The evidence tended to show that the conductor was informed of the stray horse and should have understood that there was danger of a collision as soon as the driver got upon the car.

We are of opinion that it was a question of fact for the jury, whether the conductor exercised due care to inform the motorman of the danger promptly after he was told of it himself.

*Exceptions overruled.*

## CITY BANK OF NEW HAVEN vs. ROBERT WILSON &amp; another.

Hampden. September 25, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, &amp; BRALEY, JJ.

*Assignment. Payment. Estoppel.*

In an action of contract by a bank for the price of goods sold and delivered to the defendant by the plaintiff's assignor, a corporation which had become bankrupt, it appeared that the plaintiff before the bankruptcy from time to time had discounted certain notes of the plaintiff's assignor and had taken as security an assignment of the accounts sued upon, and that the defendant in spite of notice from the plaintiff of each assignment had paid the money due on the accounts to the plaintiff's assignor at its request. The defendant introduced evidence tending to show that it had become the regular course of business between the defendant and the plaintiff's assignor for the defendant to pay the money due on the accounts to the assignor after the assignments, although in the majority of cases where these payments were made the loans to secure which the accounts had been assigned had not been paid. There was no evidence that the plaintiff authorized any of these payments and its officers testified that they had no knowledge that the payments were made, although the plaintiff's president testified that the bank might have given the defendant an occasional oral reminder that the amount had not been paid and should be, and the plaintiff's vice-president testified that complaint had been made from time to time to the treasurer and assistant treasurer of the assignor that debtors did not remit directly to the plaintiff as they should do although he was unable to say whether such complaint was made in regard to the defendant. The judge, before whom the case was tried without a jury, found for the plaintiff. *Held*, that the finding for the plaintiff was warranted; that, even if the course of business between the defendant and the plaintiff's assignor was as contended by the defendant, there was no such knowledge of and acquiescence in it on the part of the plaintiff as to estop the plaintiff from denying that the payments to its assignor had been made by its authority; and that the extent to which the plaintiff knew or had reasonable cause to know the course of business between its assignor and the defendant was a question of fact to be determined by the judge who heard the case.

MORTON, J. The plaintiff is a banking corporation of New Haven, Connecticut, and discounted from time to time notes of the E. S. Wheeler and Company, also a corporation of New Haven, dealing in plumbers' supplies, taking as collateral security therefor assignments of accounts for goods sold by that company to the defendants, who were plumbers doing business in Springfield. The E. S. Wheeler and Company became bankrupt, and this is an action to recover the amount of five accounts assigned

as aforesaid as security for loans for which the E. S. Wheeler and Company was indebted to the plaintiff. The defendants have paid the accounts to the E. S. Wheeler and Company. The judge of the Superior Court, before whom the case was tried without a jury, found for the plaintiff, and the case is here on exceptions by the defendants to the refusal of the judge to make certain findings of fact and to give certain rulings of law that were requested.

The rulings of law that were requested were in substance almost if not quite identical with the findings of fact that were asked for, and the question is whether the conduct of the plaintiff in view of what could have been found to be the course of dealing between the defendants and the E. S. Wheeler and Company was such as to prevent the plaintiff from recovering of the defendants either on the ground of estoppel or implied agency, or both.

There was testimony tending to show that the defendants first began to purchase goods of the E. S. Wheeler and Company in March, 1897, and continued to make purchases from time to time till August, 1903, and that during that time twenty-seven different purchases were made by them. As the purchases were made the accounts representing them were assigned by the E. S. Wheeler and Company to the plaintiff by separate writings as security for loans made by the plaintiff to the E. S. Wheeler and Company. Upon receipt of each assignment the plaintiff sent to the defendants a notice that the account had been assigned to it and that payment must be made to it. Notwithstanding such assignments and notices the defendants, at the request of the E. S. Wheeler and Company, paid to it from time to time the accounts thus assigned, including those now in suit, and there was testimony on behalf of the defendants tending to show that it became the regular course of business for the E. S. Wheeler and Company to receive payment of the accounts which had been assigned, and that in the majority of cases where payments were made to the E. S. Wheeler and Company the loans for which the accounts had been assigned as security had not been paid when the account was paid. There were no notices or communications to or from the plaintiff to the defendants or the defendants to the plaintiff except the notices aforesaid, and no



demand for payment, except as contained in these notices, was made upon the defendants by the plaintiff till after the bankruptcy of the E. S. Wheeler and Company. The defendants were not authorized by the plaintiff to make payment to the E. S. Wheeler and Company, and the E. S. Wheeler and Company had no authority oral or written, express or implied, to receive payment, except so far as might be inferred from the course of business, and "except," as the president of the E. S. Wheeler and Company, whose deposition was taken by the defendants, said, "so far as an occasional oral reminder to hasten collections might have reference to some such matters." This reminder he subsequently stated in the course of his cross-examination was "simply to the effect that the amount had not been paid and should be." There was an auditor's report in favor of the plaintiff which was introduced in evidence, and the vice-president of the plaintiff corporation, to whom written interrogatories were filed by the defendants, in answer to a question as to what knowledge he had that the accounts or any of them had been paid by the defendants direct to the E. S. Wheeler and Company after they had been assigned to the plaintiff, said, "I had no knowledge that any of these accounts had been paid by the defendants to Wheeler and Company direct after they had been assigned to the bank save in such cases as occurred in some of our dealings with the Wheeler Company wherein some debtors improperly sent checks to the Wheeler Company and they indorsed them over to us." He also testified that complaint was made from time to time to the treasurer and assistant treasurer of the E. S. Wheeler and Company that debtors did not remit directly to the plaintiff as they should do, though he was unable to say whether such complaint was made in regard to the defendants.

It is plain, we think, that the plaintiff did nothing and said nothing in the way of direct intercourse or communication between it and the defendants to warrant them in making payment to the E. S. Wheeler and Company. On the contrary as often as an account was assigned to it by that company, it notified the defendants of that fact and that payment must be made to it. It had no other dealings or communications with the defendants. The defendants acted of their own motion and at

the request of the E. S. Wheeler and Company, in making payment to the latter. They were not induced by anything which the plaintiff said or did to them to make such payments, and those elements of estoppel are, therefore, wanting.

The defendants contend however that, notwithstanding the notices which were thus sent, the plaintiff knew or had reasonable cause to know the course of business between them and the E. S. Wheeler and Company and acquiesced in it and thereby constituted the E. S. Wheeler and Company its agents to receive payment of the bills that had been assigned to it, and are thus prevented from objecting to the payments made by the defendants. The extent to which the plaintiff knew or had reasonable cause to know the course of business between the defendants and the E. S. Wheeler and Company, and therefore acquiesced in it, was a question of fact to be determined by the judge who heard the case. It is true that it did not appear that in a single instance was a payment made direct by the defendants to the plaintiff; but, in the opinion of the court, this may have been accounted for, in part at least, by the fact that some of the notes for which the bills were assigned as collateral were paid before the bills fell due, in which case the plaintiff would have no further interest in the collateral. Moreover the vice-president of the plaintiff corporation, who presumably had charge of or was familiar with the business of the bank, testified as already observed that he had no knowledge that any of the accounts had been paid direct to Wheeler and Company after assignment to the bank except that in some cases debtors improperly sent checks to the E. S. Wheeler and Company and they indorsed them over to the bank. There was also evidence tending to show that complaint was made to the E. S. Wheeler and Company by the plaintiff that remittances were not uniformly made to it by debtors as they should be. Still further, there was an auditor's report in favor of the plaintiff which was introduced in evidence. The judge could therefore find and for aught that appears did find that, even if the course of business was as contended by the defendants, there was no such knowledge of and acquiescence in it on the part of the plaintiff as to prevent it from objecting to the payments made by the defendants to the E. S. Wheeler and Company, either on the ground that it had thereby

constituted the E. S. Wheeler and Company its agent to receive payment or had misled the defendants by its silence. It follows that the findings and rulings that were asked for were rightly refused.

*Exceptions overruled.*

*D. E. Webster*, for the defendants.

*J. L. Doherty & W. G. Brownson*, for the plaintiff.

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TRUSTEES OF AMHERST COLLEGE *vs.* ASSESSORS OF  
AMHERST.

SAME *vs.* SAME.

SAME *vs.* SAME.

SAME *vs.* SAME.

Hampshire. September 25, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Tax, Abatement, Exemption. Amherst College. Words, "Tax bill."*

The list of taxable property required of taxpayers by R. L. c. 12, § 41, the filing of which within the time fixed by the notice is made by § 74 of the same chapter a prerequisite to an abatement of taxes, must be sworn to before one of the persons authorized to administer the oath by § 48 of the same chapter.

In the requirement of R. L. c. 12, § 78, that an application for the abatement of a tax shall be made within six months after the date of the tax bill, the term "tax bill" means the notice which the collector is required to send to each taxpayer of the amount of his tax; and such a notice on a postal card properly addressed stating the amount of the tax and for what, from whom and to whom it is due and where and when it is to be paid, and stamped with a post mark showing the day on which it was mailed although not otherwise dated, is a sufficient tax bill within the meaning of the statute, so that an application for an abatement of the tax filed more than six months after the date of such a notice is too late.

Under R. L. c. 12, § 5, cl. 3, parcels of real estate belonging to a college consisting of a house used as the residence of the president of the college and also for his official entertaining and for meeting members of the faculty, students and others who wish to see him on business, another house used as the residence of the professor of astronomy and also for astronomical work and to some extent for

hearing classes in astronomy, a grove open to the public as a park and used as a place of recreation by such students of the college as wish to walk, stroll or saunter there, a field used for outdoor sports especially at times when a larger athletic field belonging to the college is not available, and a triangular lot given to the college to make a suitable approach to the larger athletic field, are occupied for the purposes for which the college was incorporated within the meaning of the statute, and consequently are exempt from taxation.

A house assessed at \$800 and a barn assessed at \$300 standing on land assessed at \$700 and situated a short distance in the rear of the official house of the president of a college without any fence or other indication of boundary between the two properties, built for a servant of a former president who was a janitor of the college while he lived in the house, the house being let to a person not in the employ of the college at a rent of \$35 a quarter, and the barn being used by the president of the college for storage purposes, are not occupied by the college or its officers for the purposes for which the college was incorporated within the meaning of R. L. c. 12, § 5, cl. 3, and consequently are not exempt from taxation.

FOUR PETITIONS by the Trustees of Amherst College, incorporated by St. 1824, c. 84, for the abatement of taxes on certain real estate for the years 1901, 1902, 1903 and 1904. In the Superior Court the cases were heard by *Aiken*, C. J., without a jury, and were disposed of and reported to this court in the manner stated in the opinion.

The parcels of real estate belonging to the petitioners, which are held by this court to have been exempt from taxation when assessed for the years 1903 and 1904, were the President's House, Parsons Street Property or Parsons Street House, Todd House, Hallock Grove, Blake Field and Woodside Lot. All of these were included in the petitions for both of the two years named except the Woodside Lot which was included only in the petition for the year 1904. The use of the Parsons Street Property is described in the opinion. The use of the other parcels was found by the judge of the Superior Court to have been as follows :

#### The President's House.

The president's house is a structure of generous dimensions, of fine architectural appearance, with an appropriate setting of lawn and adjacent grounds, in convenient proximity to the other college buildings. On the first floor are a large hall, extensive parlors, two smaller rooms and a dining room, all so arranged as to open together in an ample way in view of the receptions and entertainment given there by the president in the

discharge of social functions pertaining to the office. Attached to the rear portion of the main structure is a wing containing a library room of good size used by the president as library, study and office. In the upper story are chambers. This house is occupied by President Harris and his family as a private residence. At the same time, the usages and customs of the college impose upon the president certain social obligations. In commencement week of each year a reception is given by the president to the college alumni and the senior class and their friends. At other times receptions are given to each class, first the freshmen and later the sophomores and then juniors and seniors. From time to time individual students are invited to dine. The social observances and usages of the character mentioned are not matters of express requirement or exaction. They are, however, expected of a president in the use of the house, and non-compliance with them unquestionably would subject him to unfavorable comment from the trustees and others, or would, at least, be regarded as a failure on his part to discharge the obligations of hospitality associated with his official position. In the case of President Harris the expenses of entertaining are borne by him from personal preference, but former presidents have been given an appropriation from the college funds for such purposes. Fuel, lights, water and other incidents of housekeeping are supplied by the president. The repairs of the house and the care of the grounds adjacent are attended to by the college.

Meetings of the faculty are held in a room known as the faculty room, in Walker Hall, one of the college buildings, and in the usual course of college business the president is in that room an hour every morning for the convenience of students, and after that he is at his house where usually in the library he meets members of the faculty, students and others who wish to see him on business. In the library the various committee meetings of the faculty are held. The principal committee of the faculty, known as the administrative committee, meets regularly on Monday evenings there. The books in the library are the president's own. A considerable part of his official work is done there, including his correspondence, though sometimes he goes to the treasurer's office and dictates letters to the stenographer in that office.

## Todd House or Observatory House.

The property, described by either of the above designations, consists of a dwelling house and about an acre of land appurtenant. The designation Todd House is used in the report for convenience and brevity. The house takes that name from David P. Todd, the professor in charge of the astronomical department of the college. An observatory, in process of construction at the times of the several hearings on the petitions, is about three hundred feet from the house.

The house, since Professor Todd moved into it in 1898, has been used first of all as a residence for himself and his family, consisting of Mrs. Todd, a daughter, and Professor and Mrs. Loomis, Mrs. Todd's parents, and in that respect its use has not differed essentially from the use of other houses by other professors of the college. Water, heat, light and all the other incidents of household maintenance and domestic economy were burdens borne by Professor Todd and in no part assumed by the college. From time to time parties and receptions have been given there by Professor and Mrs. Todd as individual hospitality and not at the expense of the college. The care of the grounds adjoining the house has been at the expense of Professor Todd. Owing to the transference of the astronomical department from old quarters to new, there have been uses to which the house has been put during his occupancy which differ from the ordinary uses of a family home. A portion of the cellar was used for the purpose of making tests to ascertain whether there were vibrations of the hill due to passing trains. It was found there was such disturbance and a method of overcoming its harmful effect was discovered by Professor Todd. He has been making in another part of the cellar experiments in possible improvements in methods of navigation. Professor Todd testified that the experiments were in part his private work and that he should not necessarily consider them the property of the college, but the question might arise if the experiments were brought to a successful conclusion, that they were also part of his work as an astronomer and were akin in their nature to astronomy. In another portion of the cellar or basement is the laundry, a good sized room, part of which was used in 1901, 1902 and 1903 for

storing instrument cases brought back from different expeditions and also a considerable part of the machinery of the old observatory in transit to the new observatory. Another room in the cellar also is used for storing instrument cases.

On the ground floor is the dining room, which in 1901, 1902, 1903 and 1904 was used between meal times to some extent for hearing classes in astronomy. Opposite is the parlor, which has no official use. In the hall are kept many of the weather records issued by government weather officials, which there are open to consultation by any one interested in them. These weather records are proper for an astronomer in reference to his work. In the hall are also tripods for instruments, all kinds of surveying instruments, and small telescopes which are carried out to the lawn and there used as occasion requires. On the same floor is a library of books belonging in the main to the college and a few to Professor Todd. In this room also the classes in astronomy usually meet as occasion requires, when the dining room is not used for recitations. In another of the rooms on this floor are one of the clocks belonging to the observatory and chronometers and sextants in use in the department of navigation.

### Hallock Grove.

Hallock Grove is a tract of seven acres of woodland; it is distant from the central portion of the college grounds about a ten minutes walk. The deed of conveyance to the college trustees, made in 1868, from Leverett Hallock, after whom the property takes its name, recites that the property "is conveyed expressly for a Public Park and if perverted to any other use it is to revert to the grantor or his heirs. Said Park is to be open to the public under such reasonable regulations as the said trustees shall see fit to adopt. No trees are to be cut on the premises except under the direction or assent of said trustees and when so cut the avails thereof shall be appropriated to aid indigent students in Amherst College.

"A strip of land on the west side 25 ft. wide and on the south side of 30 ft. wide is to be reserved for a road or highway and the said west and south lines are to be centers of roads on the west and south sides of said land."

The trees composing the grove are old growth oaks, pines,

maples and hemlocks indigenous to the soil. The undergrowth has been cleared out from time to time by the college treasurer, under whose charge the grove has been placed by the trustees. One or two paths have been wrought through the woods. The property is open to whoever desires to go there and is used by people of Amherst and by the students as a place of recreation, but the extent of such use appeared to be inconsiderable. Whatever has been expended upon the property has come from the general funds of the college. The income from the property since the deed of gift amounts to about \$125, of which \$75 was derived from large trees blown down in a fierce storm some years ago and sold for timber. The income has been used in part as scholarship gifts to two indigent students and the remainder has been used as an auxiliary to the Students Loan Fund and lent to indigent students at a low rate of interest. The amount so lent in 1903 was \$96.60 at the rate of four per cent per annum. The total expenditure upon the grove made by the college has been within two and three hundred dollars. The grove is not used for college purposes other than as a place of recreation for students who may wish to walk, stroll or saunter there. Mention of the grove is made in the college catalogue, but no use is therein prescribed, nor is any use scheduled in any printed college curriculum.

#### Blake Field.

Blake field, a lot of about seven acres, adjoins the premises on which stand the Todd house and the observatory, and is separated by a street from Hallock grove. Lucien Blake of the class of 1877, from whom the field takes its name, was interested in athletics and secured subscriptions for the purchase of the property, which was acquired by the college in 1881. It was laid out and graded at an expense of about \$7,000, with a track and a baseball ground, and was one of the best athletic fields in the country at that time. On it were held the outdoor athletic contests and exercises, both collegiate and intercollegiate. In 1888 or 1889 another athletic field, known as Pratt field after the donor, was given to the college, and since that time Pratt field has been the arena of the principal athletic events in baseball, football and other outdoor sports, in contests between



classes, fraternities and other colleges. Pratt field is an enclosed area with baseball and football grounds, a track, and a grand stand for spectators. By reason of the character of the soil which dries quickly Blake field can be used in the spring about three weeks earlier than Pratt field, and for that reason the college nine begins its preliminary outdoor practice and training on Blake field, going to Pratt field as soon as it is in a condition for use, after which the use by the college boys of Blake field drops off, though it still is resorted to by the students for minor matches and games between classes and fraternities, if Pratt field is occupied at the time. The town boys of Amherst are allowed free use of Blake field as a ball ground, and games are played there between scrub teams made up of boys and young men not members of the college and between nines and elevens of the Amherst high school and other schools. There is no income derived by the college from Blake field.

The football and baseball teams are student organizations controlled by the faculty. Every student is expected to perform a certain amount of physical exercise. It is left to the department of physical education and hygiene to determine the amount and kind.

#### Woodside Lot.

Woodside lot, a piece of property which appears only in the petition for the year 1904, is a triangular area of land, one hundred and thirty-six feet on each of two sides and one hundred and ninety-seven feet on the third side, containing ten thousand four hundred square feet, which is about equal to the average house lot in the vicinity. This triangular lot is near the principal entrance to Pratt field, and one of the angles of the triangle is opposite that entrance and fifty feet distant from it. There is and was sufficient room for a crowd to enter or leave Pratt field without coming in contact with the triangle, but the usual and natural course of the principal part of the travel on foot is to cut across the corner of the triangle near the main entrance. Mr. Pratt, the donor of Pratt field, purchased this triangular lot and gave it to the college. At the expense of the college it has been smoothed over, levelled and put in condition. The purchase was made from aesthetic considerations. The appearance of the approaches to the main en-

trance of Pratt field has been improved by the treatment of the triangle since its acquisition by the college and is helped by having the triangle remain open. No building is in contemplation upon this lot. No financial profit has been derived from this property by the college and none is likely to be.

*M. F. Dickinson & W. B. Farr*, for the petitioners.

*W. J. Reilley*, (*W. G. Bassett* with him,) for the respondents.

MORTON, J. These are four petitions for the abatement of taxes assessed upon real estate of the petitioners in the town of Amherst by the assessors of Amherst for the years 1901, 1902, 1903 and 1904. Abatements were refused by the assessors and thereupon the taxes were paid under protest and appeals taken to the Superior Court. The cases were heard together by a judge without a jury. The petitioners contended in each case that the property was exempt from taxation. The judge found for the petitioners in each case and ordered judgment against the inhabitants of the town for the amount paid, with interest, and by agreement of parties reported the cases to this court; judgment to be entered on the findings if correct, otherwise such judgments to be entered as the court should deem proper.

The respondents contend generally that the property was rightly assessed. They contend further in regard to the taxes assessed for the years 1901 and 1902 that the lists filed by the petitioners were not sworn to, and the judge found, as a fact, that they were not. They contend still further in regard to the tax for the year 1901 that the application for abatement was not made within six months after the date of the tax bill.

We take up first these formal matters, assuming, without deciding, that the provisions of the Revised Laws in regard to abatements apply to the tax of 1901 though it was assessed before they went into effect. Some contention is made by the petitioners that the evidence, which is stated in the report, did not warrant a finding that the lists of 1901 and 1902 were not sworn to. But we deem it enough to say of this contention that the finding appears to us to have been clearly warranted by the evidence. The question remains on this branch of the case as to the effect of the finding on the right of the petitioners to an abatement of the taxes for those years.

The petitioners concede that previous to the Revised Laws the

filing of a sworn list was a condition precedent to an abatement (*Otis Co. v. Ware*, 8 Gray, 509; *Charlestown v. County Commissioners*, 101 Mass. 87); but they contend that this has been changed and that now the list need not be sworn to unless required by the assessors; in other words, that the sworn list, which was formerly compulsory, is now optional with the assessors. They rely, for this contention, on the fact that the list to be furnished is that required by § 41 of R. L. c. 12, and that there is no express provision in that section as there was in the corresponding section in the Public Statutes (c. 11, § 38), that the list shall be sworn to. They also rely upon the fact that a verification on oath of the list is expressly required in the case of an applicant for abatement of his real estate tax when the notice did not require real estate to be included in the list brought in by the taxpayer. But it is manifest we think that the list required in § 41 is a sworn list. It is the list which taxpayers are to bring in in accordance with the notice which the assessors are required to post. And § 43 provides that "The assessors shall in all cases require a person bringing in a list to make oath that it is true," meaning, as we think, that the list referred to in § 41 when brought in shall be sworn to, and that the assessors or their secretary or head clerk may administer the oath, and that, until sworn to, it is not the list which the taxpayer is required to bring in. The omission from § 74 of R. L. c. 12 of the requirement of an oath was no doubt for the purpose of condensation and is immaterial so long as the list required by § 41 is a sworn list. The section (§ 74) is as reported by the commissioners, except that the numbering has been changed, and they make no reference to any change in the law in regard to a sworn list as intended or desirable. See Report of Commissioners for consolidating and arranging the Public Statutes, c. 12, § 76. The provision for a sworn list where the notice does not require real estate to be included has no tendency to show that the other list required in § 74, and which is the one that we have been considering, need not be a sworn list. It relates to a different situation, and, if anything, tends rather to show that the other list must also be a sworn list. It follows that the action of the assessors in refusing to abate the taxes assessed for the years 1901 and 1902 was right because

sworn lists were not filed as required by statute, and that the finding of the Superior Court in favor of the petitioners for the amounts paid for those taxes, and interest, was wrong.

We also think that application for the abatement of the tax of 1901 was not made within six months after the date of the tax bill. The statute provides that "The collector shall forthwith, after receiving a tax list and warrant, send notice to each person who is assessed, resident or non-resident, of the amount of his tax." R. L. c. 13, § 3. An examination of the corresponding sections of previous statutes shows that, in St. 1889, c. 334, § 1, of which the present provision is a re-enactment, the word "notice" was substituted for the term "tax bill" which had been the word used hitherto, but the term "tax bill" was still retained in the provision relating to an application for an abatement. R. L. c. 12, § 73. Manifestly as there used it has reference to the notice which the collector is required to send to each taxpayer of the amount of his tax. In the present case the notice that was sent consisted of a postal card which bore on its face the address, "Amherst College, Amherst, Mass.," with the postmark "Amherst Mass., July 17, 1901" and on the back the words printed and written that are printed in the footnote.\* We think that this constituted a tax bill within the meaning of the statute. It contained the amount due, for what and from whom and to whom due and where and when to be paid. It was not dated by the collector, but the postmark showed when it was sent out and that was a sufficient date. The application for abatement was not made till March 22, 1902, which was clearly too late.

There remain the taxes for the years 1903 and 1904. In regard to these the only question is whether the several parcels of real estate for which the petitioners were assessed were or

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\* The words printed and written on the back of the card were as follows:

Tax Collector's Notice.

M. . . . . Amherst College

Your town county & state taxes for 1901 are      \$1542.60

Watering Streets      17.50

Taxes are now payable at the collector's office

Interest added after October 10, 1901.

C. H. Edwards, Collector town of Amherst, Mass.

were not exempt from taxation. The principles of law applicable to cases of this kind have been recently stated and applied in several cases and it is not necessary to restate them. *Emerson v. Milton Academy*, 185 Mass. 414. *Phillips Academy v. Andover*, 175 Mass. 118. *Harvard College v. Cambridge*, 175 Mass. 145. *Amherst College v. Amherst*, 178 Mass. 232. *Williams College v. Williamstown*, 167 Mass. 505. *Mount Hermon Boys' School v. Gill*, 145 Mass. 139. *Massachusetts General Hospital v. Somerville*, 101 Mass. 319. Applying the rules thus laid down we think that the presiding judge was warranted in finding upon the facts before him that of the parcels for which the petitioners were assessed in 1903 and 1904, the President's House, Todd House, Hallock Grove, Blake Field and Woodside Lot were owned and occupied by the college for the purposes for which it was incorporated and were therefore exempt from taxation. *Emerson v. Milton Academy*, *ubi supra*. *Harvard College v. Cambridge*, *ubi supra*. With respect to the "Parsons Street Property" as it is called in the petition for the abatement of the taxes of 1903, or "Parsons Street House" as it is called in the petition for the abatement of the taxes of 1904, both descriptions meaning, we assume, the same property, the case stands differently. This property consists of a house assessed at \$800, a barn at \$300 and land at \$700, and is situated a short distance in the rear of the President's House without any fences or other indications of boundary or division between the two properties. The house was built during President Stearns's time, which was from 1854 to 1876, for a servant of his who was a janitor of the college for many years during which he lived in the house. In 1901 and 1902 the house was rented to a man who was not an employee of the college at \$35 a quarter. For aught that appears it was so occupied in 1903 and 1904. The barn is used by the president for storage purposes. The land assessed with the house consists of half an acre which is the size of the average house lot on that street. It is the use of the property at the time when the tax is assessed which determines whether it is exempt from taxation or not. And it is plain it seems to us that neither in 1903 nor 1904 was this property occupied by the college or its officers for the purposes for which the college was incorporated.

The result is that the petitions for the abatement of the taxes assessed for the years 1901 and 1902 must be dismissed with costs and judgment entered for the petitioners for the amounts paid for the years 1903 and 1904 less the taxes on the Parsons Street Property, with interest, on the amounts thus ascertained and with costs.

*So ordered.*

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MARY F. PETERS & others vs. HENRY B. STONE.

Worcester. October 2, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Covenant. Landlord and Tenant. Words, "Improvements."*

The lease of a farm for three years, containing no restriction as to its assignment, gave the lessees the right to purchase the premises at any time during the term at their option, at a different price named for each of the three years. The lessees covenanted "to make all repairs needed or required by them to revert to the owners," and also "to make improvements on said premises to the value of at least \$1,000 during said term and to leave the same therein at the end of said term if they do not purchase the premises." Within three months the lessees assigned the lease to a corporation organized for the purpose of selling poultry, which took possession of the premises and erected and occupied certain poultry buildings. Neither the original lessees nor their assignee attempted to exercise the option to purchase the premises. There was a default in the payment of rent, and the lessors brought a summary process against the lessees for possession of the premises and recovered judgment. The assignee voluntarily vacated the premises while the summary process was pending. A creditor of the assignee attached the poultry buildings as its property, obtained judgment, sold the buildings on execution and purchased them at the execution sale. In a suit in equity brought by the lessors against the purchaser at the execution sale to enjoin him from removing the buildings from the plaintiffs' land, it was held, that the covenant in the lease, to make improvements on the premises during the term and to leave such improvements thereon at the end of the term if the lessees did not purchase the premises, ran with the land and was binding on the assignee of the lease; therefore that the buildings upon their erection became part of the realty and no title passed to the defendant under the execution sale, and the plaintiffs were entitled to a decree.

BILL IN EQUITY, filed in the Superior Court on August 4, 1905, by the owners of a farm of about fifteen acres situated on both sides of Malden Street in Worcester, praying for an injunction to restrain the defendant from removing certain

poultry buildings from the premises of the plaintiffs which had been attached and levied on by the defendant as personal property of the Park Villa Farm Company, a corporation, and had been purchased by the defendant at the execution sale.

An interlocutory injunction was issued and the case was referred to a master. Later the case was heard by *Stevens*, J. upon the master's report.

The following facts were found by the master :

On July 15, 1903, the plaintiffs, while owning a fruit and vegetable farm in Worcester, executed and delivered a lease thereof to H. S. Park, T. H. Clarkson and C. R. Macomber for the term of three years from the first day of August, 1903. A copy of the lease is printed below.

On October 3, 1903, the lessees, Park, Clarkson and Macomber executed and delivered an assignment of the lease to the Park Villa Farm Company, a corporation established under the laws of the State of Maine. A copy of the assignment also is printed below. The plaintiffs were not parties to this assignment, made no agreement to accept the corporation as their tenant in lieu of the original lessees, and made no release of the tenants named in the lease therefrom or from any covenant contained therein. The Park Villa Farm Company was incorporated on August 24, 1903, for the purpose of raising and selling poultry.

Under the assignment the Park Villa Farm Company took possession of the leased premises and erected structures thereon for carrying on its business. All of these buildings were constructed of spruce with spruce rafters; the roofs were covered with spruce boards and roofing paper. They all stood upon posts sunk in the ground, except an incubator building which was on a stone foundation and under which was a cellar. The heating apparatus was in this cellar and pipes extended to the brooding houses. All of these buildings were erected by the Park Villa Farm Company, with the knowledge of the lessors while that company was the assignee of the lease, with the intention and for the purpose of carrying on the business of that corporation.

Default having been made in the payment of the rent reserved in the lease, the lessors, the plaintiffs in this suit, began an action of summary process against Park, Clarkson and Mac-

omber in the Central District Court of Worcester, to recover possession of the leased premises.

In that action Park, Clarkson and Macomber appeared by counsel and filed an answer. The plaintiffs recovered judgment against them for possession of the premises.

No execution for possession issued in the case, the Park Villa Farm Company having voluntarily vacated the premises during the pendency of the action. None of the buildings erected by the corporation ever were removed.

Under a contract with the Park Villa Farm Company the defendant in this suit sold and delivered to that corporation the building paper which was used in the construction of the buildings. The corporation did not pay him for it, and on November 4, 1904, he began an action against the corporation in the Central District Court of Worcester to recover damages for non-payment of his claim and attached the poultry buildings as the property of the corporation. On June 9, 1905, he recovered judgment against the corporation; on June 12, 1905, execution issued; on July 5, 1905, the buildings were levied on and on July 31, 1905, they were sold on execution and were purchased by the judgment creditor, the defendant in this suit.

The lease referred to above was as follows :

" This indenture, made the fifteenth day of July, in the year of our Lord one thousand nine hundred and three.

" Witnesseth, that we, Mary F. Peters, Lewis A. Peters, both of Worcester in the Commonwealth of Massachusetts, John E. Peters, of Gardner, in said commonwealth, and Charles A. Peters, of Moscow, State of Idaho, do hereby lease, demise and let unto H. S. Park, T. H. Clarkson and C. R. Macomber, all of Worcester in the Commonwealth of Massachusetts, a certain farm, with the buildings thereon, containing about fifteen acres, situated on both sides of Malden Street, in said Worcester, now occupied by William Brackett, and bounded north by land of Fred L. Chamberlain, east by land of C. H. Ellsworth, south by land of John Hand and by Brooks Street and west by land of C. D. Thayer.

" It is understood and agreed by and between the parties hereto that the said lessees shall have the right to purchase said premises at any time during the term of this lease at their option. The lessors hereby agree to give to the lessees upon



the terms hereinafter stated a warrantee deed of the aforesaid premises in fee simple absolute to them and their heirs and assigns to their own use and behoof forever. If they purchase the same during the first year of said term the price is to be forty-one hundred (\$4,100) dollars, if during the second year forty-two hundred (\$4,200) dollars, and if during the third year forty-three hundred (\$4,300) dollars, and if said lessees shall purchase said premises during said term and pay for the same, the rent herein reserved shall thereupon cease and the lessees shall be credited with the sum of two (\$2.00) dollars for each and every month's rent by them theretofore paid, to be deducted from the purchase price of said premises. The said estate to be free and clear of all incumbrances.

"To have and to hold to the said lessees, their heirs and assigns for the term of three years from the first day of August, nineteen hundred and three, yielding and paying therefor the rent of seven hundred and twenty (\$720) dollars. And said lessees do promise to pay the said rent in equal monthly payments of twenty (\$20) dollars each, the first of said payments to be made on the first day of September, 1903, and a like payment on the first day of each and every month thereafter during said term, and to quit and deliver up the premises to the lessors, or their attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said lessors, and said lessees agree to make all repairs needed or required by them to revert to the owners, and to pay the rent as above stated, during the term, and also the rent as above stated, for such further time as the lessees may hold the same, and not make or suffer any waste thereof; or make or suffer to be made any alteration therein, but with the approbation of the lessors thereto, in writing, having been first obtained; and that the lessors may enter to view and make improvements, and to expel the lessees, if they shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof and said lessees agree to make improvements on said premises to the value of at least one thousand (\$1,000) dollars, during said term and to leave the same therein at the end of said term if they do not purchase the premises. And

provided, also, that in case the premises, or any part thereof during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent herein before reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessors.

“In witness whereof, we hereunto set our hands and seals this fifteenth day of July, in the year one thousand nine hundred and three.”

Here followed the signatures of the lessors and of the lessees, and an acknowledgment of the instrument by one of the lessors before a justice of the peace. The assignment executed on the back of the lease was as follows:

“Worcester, Mass. Oct. 3rd. 1903.

“We hereby assign, set over and transfer to the Park Villa Farm Company, a corporation duly organized by law and having a place of business in Worcester, Mass. the within lease and all rights and benefits to be derived therefrom and subject to all the conditions and covenants by the lessees to be performed.

“H. S. Park. T. H. Clarkson. C. R. Macomber.”

The defendant asked the judge to rule as follows:

1. The covenant in said lease, to wit, “and said lessees agree to make improvements on said premises to the value of at least one thousand (\$1,000) dollars during said term and to leave the same therein at the end of said term if they do not purchase the premises,” is a personal covenant, does not run with the land, is binding upon the lessees only, and the assignees of the lease are not bound by it.

2. The acceptance of the assignment by the assignee corporation not being in writing, cannot be proved or is not enforceable as against it, because of the statute of frauds. [Not argued.]

3. The buildings seized upon execution and sold at execution sale to the defendant Stone are personal property, and the buildings were in law in possession of the attaching officer from the

time of the attachment, divested the title of the debtor corporation and operated as a transfer of title.

4. The corporation which placed the buildings on the land for its purposes as assignee of the lease, had the right to remove them within a reasonable time not only as against the lessee but also as against the lessor after vacating the premises.

5. The agreement of the lessees to have improvements on the land is merely a covenant collateral to the land, does not concern the thing demised, and the assignee of the lease should not be charged with such agreement; that equity will not enforce an affirmative covenant not running with the land against the assignee of the lease whether he had notice of the covenant or not.

6. The plaintiffs are estopped by the ejectment proceedings brought in December, 1904, from claiming that the lessees were not in possession prior thereto. The rights of the defendant Stone are as of November 5, 1904, when the attachment was made, a month before the ejectment proceedings were instituted. [Not argued.]

7. The plaintiffs have been guilty of laches in bringing this suit. [Not argued.]

8. The buildings placed on the land by the corporation were trade fixtures and removable as such, under the principles of law which apply thereto and the corporation which erected them had the right to remove them.

9. Upon the pleadings and the master's report, as a matter of law, the finding should be for the defendant.

The judge refused to rule as requested by the defendant, and entered a decree for the plaintiffs. The defendant alleged exceptions. He also appealed from the decree, but insisted "upon his exceptions rather than his appeal." The points raised by the refusal of the requests numbered 2, 6 and 7 were not argued.

*W. C. Mellish*, for the defendant.

*E. F. Thompson*, (*C. S. Dodge* with him,) for the plaintiffs.

BRALEY, J. The rights of the parties to the buildings in controversy depend upon the construction of the lease given by the plaintiffs to the assignors of the judgment debtor, under whom the defendant claims ownership. This instrument by apt words

demised a farm of about fifteen acres, with the buildings, for the term of three years at a fixed rental, with an agreement that the lessees might purchase the premises at a price to be adjusted in amount according to each year of their occupation. The usual covenants were inserted, which included an agreement by the lessees "to make all repairs needed or required by them," which at the end of the term were "to revert to the owners." At the close of this recital the following provision appears: "said lessees agree to make improvements on said premises to the value of at least one thousand . . . dollars during said term and to leave the same therein at the end of said term if they do not purchase the premises." While inartificially expressed the language employed was sufficient to create a binding obligation as no precise form of technical words is required to create a covenant, but corresponding expressions, or a clear manifestation of such an intention are all that is required. *Trull v. Eastman*, 3 Met. 121, 124. And it is evident that the lessees expressly charged themselves with the performance of a promise to increase the value of the property to this amount, which also must be understood as forming part of the consideration for the lease.

The corporation, however, to which the lessees assigned their estate was not a party, and would not be bound to its performance except by privity of estate, but in general covenants defining the manner in which the demised premises shall be enjoyed or dealt with run with the land and bind the covenantee. They also bind an assignee as to his rights in the real estate, even where assigns are not named, when the beneficial act to be performed relates solely to increasing the value of the premises as they exist at the date of the lease. *Morae v. Aldrich*, 19 Pick. 449. *Hurd v. Curtis*, 19 Pick. 459, 462. *Patten v. Deshon*, 1 Gray, 325, 329. *Easterby v. Sampson*, 6 Bing. 644. *Vyvyan v. Arthur*, 1 B. & C. 410. *Congleton v. Pattison*, 10 East, 130. *Spencer's case*, 5 Coke, 16 a. The word "improvements" is of broad signification, covering not only repairs and additions to buildings in existence at the time of the demise, but also new buildings subsequently erected, and if in this covenant assigns are not again mentioned they are named in the preceding habendum. *South Congregational Meeting-house v. Hilton*, 11

Gray, 407, 408. *Kabley v. Worcester Gas Light Co.* 102 Mass. 892, 894. *Haven v. Adams*, 8 Allen, 363. *Daggett v. Tracy*, 128 Mass. 167. *Schenley's appeal*, 70 Penn. St. 98, 102. *Stockett v. Howard*, 34 Md. 121. *Low v. Innies*, 4 DeG., J. & S. 286. It is then a question of construction whether the immediate parties intended to define and control only their personal obligations, or whether they also intended by this covenant to bind whomsoever might succeed to their respective estates, and this question must be determined from the language and purpose of the entire instrument. *Dunklee v. Webber*, 151 Mass. 408. *Jones v. Parker*, 163 Mass. 564, 568. *Carpenter v. Pocasset Manuf. Co.* 180 Mass. 130, 132. *Hollywood v. First Parish in Brockton*, 192 Mass. 269. *Masury v. Southworth*, 9 Ohio St. 340. *Clegg v. Hands*, 44 Ch. D. 503, 517, 518. Upon the acceptance of the assignment the assignee succeeded not only to the burdens but to the benefits attached to the leasehold, among which was the right to buy the premises, found in the covenant of the lessors, which ran with the land and could have been enforced by the corporation. *Van Horne v. Crain*, 1 Paige, 455. *Hagar v. Buck*, 44 Vt. 285. By engaging to make improvements upon the conditions named, while enhancing the value of the reversion, the lessees also would receive the beneficial use of the buildings during the remainder of the term as well as increasing the value of the premises for the betterment of themselves, or their assigns, if ultimately either elected to purchase, with the further benefit of a fixed rebate to the purchaser of the rent which had been paid for the preceding months. These various provisions when taken in connection with the silence of the lease as to any restriction prohibiting the lessees from assigning their estate, which included the right to acquire the fee by purchase, leads to the reasonable conclusion that the covenanting parties intended that all the covenants regarding the manner in which the demised premises should be used and enjoyed, or improved by the lessees, should not only bind them personally as to their interest in the premises, but also those who by assignment might succeed to their estate. *Hollywood v. First Parish in Brockton*, *ubi supra*. Upon the delivery of the assignment the corporation entered into possession and erected and occupied the buildings, which, because of this covenant, upon their erec-

tion at once became part of the realty. During the pendency of a suit by the plaintiffs to recover possession, the corporation without having taken advantage of the option to purchase abandoned the premises before the expiration of the term, and as neither at the time of the attachment nor of the levy of the execution were the buildings the personal property of the judgment debtor, the defendant acquired no title at the sale. *Westgate v. Wixon*, 128 Mass. 304, 307. *Aldrich v. Husband*, 131 Mass. 480.

*Exceptions overruled; decree affirmed.*

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FIRST BAPTIST SOCIETY IN BROOKFIELD & another vs.  
JOSEPH P. DEXTER & others.

Worcester. October 2, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Equity Pleading and Practice*, Appeal, Injunction. *Rules of Court*.

Where a bill in equity sets out a sufficient ground for relief and the findings of the judge who heard the case support the allegations of the bill, on an appeal from a decree for the plaintiff without any report of the evidence the findings of the judge are conclusive.

Under the provision of Equity Rule 2 of the Superior Court, that no injunction shall issue except upon a bill which has been sworn to or verified by affidavit, it is sufficient if the bill is sworn to by one of two plaintiffs.

On an appeal in a suit in equity from a decree granting an injunction it is too late to raise for the first time the point that the injunction should not issue because the bill was not sworn to as required by the provision of Equity Rule 2 of the Superior Court.

RUGG, J. This is a suit in equity brought by the first named plaintiff, a religious society incorporated by an act passed on June 17, 1800, (see St. 1904, c. 239,) and William F. Hayward, claiming to be its treasurer.

The bill was filed on February 5, 1906, and alleged that on the first Monday of January, 1906, a judgment was entered in the Superior Court in favor of the plaintiff society against the Spencer Savings Bank for the sum of \$500 without costs; that upon demand by the defendant Dexter, acting for the defendant Hood, who claimed to be the treasurer of the plaintiff society,

the savings bank refused to pay the amount called for by the execution, and that thereupon the execution was placed in the hands of the defendant Snell, a deputy sheriff, who collected the amount due thereon from the savings bank, and that contemporaneously with the collection of the execution, there was handed to the defendant Snell a written notice informing him that the plaintiff Hayward was the lawful treasurer of the plaintiff society, and the only person authorized to receive the money so collected; that thereafter the defendants, Hood and Dexter, wrongfully, without authority and against the rights of the plaintiffs, caused an action to be brought in the Superior Court, in the name of the plaintiff society against the defendant Chamberlain as the sheriff of the county of Worcester, to compel the payment of the money collected by the defendant Snell. The prayers were for a determination as to whether Hayward or Hood was the lawful treasurer of the plaintiff society, and as to the person entitled to receive the money collected by Snell, and for injunctions against the defendants Dexter and Hood from prosecuting the suit against the defendant Chamberlain, from using the name of the society in other proceedings, and from collecting or receiving said money. The defendants Dexter and Hood filed several answers, setting out among other allegations that the defendant Hood was the legal treasurer of the plaintiff society and denying that the plaintiff Hayward was such treasurer. The other defendants duly answered and issue was joined.

A hearing was had before a judge of the Superior Court, who found, among other matters not now material, that the plaintiff Hayward was duly elected treasurer at a legal meeting of the First Baptist Society in Brookfield on April 28, 1905, that he continued to be to the date of the decree the lawful treasurer of the society and that the defendants Dexter and Hood had no authority to collect or receive the money in the hands of the defendant Snell, nor to commence litigation in the name of the plaintiff society, and that the defendant Hood wrongfully claimed to be its treasurer. In other words, it is found that before the demand made by Dexter acting for Hood upon the Spencer Savings Bank and upon Snell, and before the commencement of the action against Chamberlain which, among other matters, the bill seeks to restrain, Hayward was the treasurer of the plaintiff

society and that Hood wrongfully was claiming to be such treasurer and without authority of the society was employing an attorney to institute a suit and demand money in its name.

A decree was entered in the Superior Court, that the plaintiff Hayward was the legal treasurer of the plaintiff society and ordering the money in the hands of the defendant Snell to be paid to the plaintiff Hayward, as treasurer of the plaintiff society, and perpetually enjoining the defendants, Dexter and Hood, from prosecuting the suit of the First Baptist Society in Brookfield against Chamberlain, and from using the name of the society in any other proceeding, and further ordering that the defendant Hood pay the costs. From this decree the defendant Hood alone appealed.

Neither the records of the meeting of the plaintiff society touching the election of Hayward as treasurer at the meeting of April 28, 1905, nor those of the meeting at which the defendant Hood claimed to have been elected treasurer are before us and no evidence relating to these or any other matters is reported, although certain records of the society not now material are made a part of the findings. Under these circumstances, there is no reason whatsoever why we should disturb the findings of the judge. It is too clear for argument that the findings we have recited are conclusive and there is nothing in the record upon which to base a criticism of their correctness, or to found a suggestion that the evidence permitted any other conclusion to be reached. It is impossible for us to reverse them. *Holt v. Silver*, 169 Mass. 435, 457. The only matter open to the defendant to argue is that the decree did not correspond with the allegations and prayers of the bill and could not lawfully be entered on the facts found. *Kerse v. Miller*, 169 Mass. 44. *White v. White*, 169 Mass. 52. It is plain that the bill sets out sufficient ground for relief in equity, that the findings in the Superior Court abundantly support the allegations of the bill, and that its prayers fully cover the terms of the decree.

It is urged that the allegation in the bill that Hayward was elected treasurer of the plaintiff society on May 27, 1904, and has ever since been the lawful treasurer of the said corporation, confined the issues to the validity of the election upon that date. There is nothing in this. The finding of facts by the Superior



Court supports the allegation, so far as material to the issues here depending.

The defendant also suggests that the bill is not sworn to by the plaintiff society, and therefore that no injunction can issue under Standing Order 5 of the Superior Court.\* Oath was made by the plaintiff Hayward and nothing more was required. Moreover, it is now quite too late to raise the point for the first time.

It is not necessary to refer to the other findings nor discuss the remaining questions argued by the appellant, for they relate to wholly immaterial matters.

*Decree affirmed, with double costs against the defendant Hood.*

*J. P. Dexter*, for the defendant Hood.

*H. E. Cottle*, for the plaintiffs.

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### ETHAN BROOKS vs. INHABITANTS OF WEST SPRINGFIELD.

Hampden. October 3, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Practice, Civil, Agreed statement of facts. Tax. Mortgage.*

No inferences can be drawn from an agreed statement of facts unless the power to do so is given by the agreement.

The provisions of R. L. c. 12, §§ 16, 18, in regard to separate taxation of the interests of mortgagors and mortgagees in real estate do not apply to a mortgage made by a corporation organized under the laws of another State, which includes besides real estate in this Commonwealth real estate in other States and also the machinery, equipment, patents, trademark and franchises of the corporation.

APPEAL under R. L. c. 12, § 78, from the refusal of the assessors of the town of West Springfield to abate a tax assessed

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\* The Standing Order referred to was in the Rules of the Superior Court of 1900 as follows: "5. No injunction shall issue except upon a bill which has been sworn to, or upon verification of the material facts by affidavit." This now is incorporated at the end of Equity Rule 2 of the Rules of the Superior Court of 1906.

to the petitioner upon a bond of the American Writing Paper Company, a corporation organized under the laws of the State of New Jersey, filed in the Superior Court on December 4, 1905.

In the Superior Court the case was submitted to *Hitchcock*, J. upon the following agreed statement of facts :

The petitioner is a resident of West Springfield. He brought to the assessors of that town a tax list, as alleged in the petition. Thereupon the assessors assessed a tax upon his property, as alleged, which included a bond of the American Writing Paper Company, a corporation organized under the laws of the State of New Jersey, of the denomination of \$1,000. Being aggrieved by the tax assessed on this bond, the petitioner within six months after the date of his tax bill applied to the assessors for an abatement of the tax, which the assessors refused to grant, and, within ten days after their decision, the assessors gave a written notice thereof to the petitioner on October 18, 1905. The bond was one of an issue of seventeen millions, each of the denomination of \$1,000. The issue of seventeen millions was secured by a first mortgage on all of the real estate of the American Writing Paper Company in the States of Massachusetts, Connecticut, Wisconsin, Ohio and Michigan. - The value on the first day of May, 1905, of all the real estate so mortgaged to secure these bonds was \$16,604,534.03. Of this real estate seventy-nine and ninety-eight one hundredths per cent was in the Commonwealth of Massachusetts; seven and fifty-three one hundredths per cent was in the State of Connecticut; six and forty one hundredths per cent was in the State of Wisconsin; five and six one hundredths per cent was in the State of Ohio; and one and three one hundredths per cent was in the State of Michigan. The mortgage securing the bonds bore date July 1, 1899, and was held by the Old Colony Trust Company, a corporation established under the laws of this Commonwealth, in trust to secure the bonds, and the mortgage was duly recorded in the registry of deeds of the counties in this Commonwealth in which the real estate in this Commonwealth was situated. On May 1, 1905, when the tax was assessed, the corporation was the owner, free from incumbrances or liability for debts of any kind except indebtedness on these bonds, of personal property of the value of \$5,613,614.98 ;

which was the only personal property owned by it and which was in the States of Massachusetts, Connecticut, Wisconsin, Ohio and Michigan.

By the copy of the mortgage, which was incorporated by reference in the agreed statement of facts, it appeared that the corporation conveyed by the mortgage "all its real estate, buildings and machinery, equipment, patents and trade-marks, including all now owned and all hereafter acquired and wherever situate, together with all its franchises and all the rights, easements and privileges thereto appertaining, and with full power on the part of the Trustee (so far as it lawfully may) to succeed to and enjoy all the said rights, privileges, immunities and franchises, corporate and otherwise, of said Company."

The judge ruled *pro forma* that the petitioner was not entitled to an abatement, and found for the respondent. At the request of both parties he reported the case for determination by this court, such judgment to be entered as law and justice might require.

*C. L. Long*, for the petitioner.

*J. B. Carroll & W. H. McClinton*, for the respondent.

BRALEY, J. The mortgagor covenanted to pay all taxes that might be assessed, and the burden of proving that under R. L. c. 12, §§ 16, 17 and 18 the mortgagee's interest should have been separately taxed was on the petitioner. By § 45 of the same chapter, which re-enacted St. 1882, c. 175, § 1, unless a statement under oath is made either by a mortgagor or mortgagee of the amount of the mortgage within the time provided by § 41 for bringing in lists of taxable property the tax shall not be invalid because not separately assessed. It was pointed out in *Worcester v. Boston*, 179 Mass. 41, 49, which construed the original act in connection with Pub. Sts. c. 11, §§ 14, 15 and 16, now R. L. c. 12, §§ 16, 17 and 18, that these provisions were not generally regarded by assessors, and where the mortgagee has not taken possession the premises are taxed to the mortgagor, and no assessment is levied on the mortgagee's interest. These various sections when construed together mean that if separate assessments have not been made by reason of the failure of either of the parties to make such request, then the tax is properly assessed solely upon the mortgaged land. The consequent

exemption of the mortgagee from taxation for the debt would follow as in this indirect manner it already has been valued and taxed as real estate, except in those cases where the loan exceeds the assessed value of the security, when the excess becomes taxable as personal property. The present case is submitted upon agreed facts from which no inferences can be drawn, and unless it affirmatively appears that an assessment should have been laid in one or the other of these forms there is no just cause of complaint. *Olds v. City Trust Co.* 185 Mass. 500, 506.

The bond owned by the petitioner is one of a series issued by a foreign corporation, which to secure their payment gave a mortgage running to a domestic trustee of its real property situated in this and other States, and also of its machinery, equipment, patents, trademarks and franchises. Having been taxed for its market value, he petitioned for an abatement upon the ground that being secured by a mortgage of real estate the bonds were exempt, and that as the interest of the mortgagee was taxable, to tax them separately would be in effect the imposition of a double levy. The debt represented by the bond ordinarily would be classified and taxed as personal property at the domicile of the owner. It still remained money at interest due to the holder, and apart from our statute requiring a separate assessment of the debt as realty an abatement could not be ordered, although the land alone had been subjected to a tax for its full valuation, as the right separately to assess the debt secured, and the security to the mortgagor as owner would be unimpaired. R. L. c. 12, §§ 4, 51. It was, however, within legislative authority to provide that the interest of the mortgagee should be treated and taxed as real estate. *Worcester v. Boston, ubi supra. Abbott v. Frost*, 185 Mass. 398, 399, 400. Without reviewing previous legislation to which reference is fully made in these cases, it is provided by R. L. c. 12, § 4, cl. 2, that "any loan on mortgage of real estate, taxable as real estate," shall not be taxable as personal property, and by § 16 the interest of the mortgagee in real estate mortgaged to secure the payment of a fixed sum is to be so assessed. In theory the tax is levied on the amount of the debt outstanding, as in this way, unless the equity is valued at less than the loan, the total valuation represented by the legal and equitable estates is equalized.

The earlier statute of which this is a re-enactment was construed in *Knight v. Boston*, 159 Mass. 551, 553, to include negotiable bonds secured by a mortgage of real estate situated wholly in Massachusetts. Our system of taxation is purely statutory, and the conditions which underlie the exemption are plainly stated. They are, that the debt must be secured by a mortgage of realty, and that the mortgagee's interest must be taxed as real estate. *Firemen's Ins. Co. v. Commonwealth*, 137 Mass. 80, 81. This legislation, moreover, is limited to property within this jurisdiction, and in the construction of statutes relating to taxation, if otherwise taxable, property is not exempt unless such an intention is clearly manifested by express enactment, and an exemption is not to be created by implication. *Dwight v. Boston*, 12 Allen, 316, 322. *State Treasurer v. Auditor General*, 46 Mich. 224. *Redemptorist Fathers v. Boston*, 129 Mass. 178. *Corcoran v. Boston*, 185 Mass. 325, 326. *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 617. Under the conditions of the mortgage the outstanding indebtedness of itself as between the mortgagor and mortgagee is not territorially divisible, and the entire mortgaged property is held for its payment. If it had been the legislative purpose to grant an exemption of what otherwise would be personal property whenever the taxpayer owned a debt secured by a mortgage of his debtor's real property wherever situated, provided the debt was there taxable as real estate, then by appropriate enactment this would have been declared, with a provision for its valuation, or if both classes were mortgaged, then for a just apportionment between the value of the lands within and those without the Commonwealth. But instead of placing a mortgagee thus secured on an equality with a mortgagee secured by a mortgage entirely on lands situated here, provision is made in §§ 16 and 45 for a proportional valuation only where the mortgaged lands are situated in two or more cities or towns, or include two or more estates or parts of an estate. This language in terms applies to domestic real estate, and does not include a debt secured in whole or in part on outside lands, the taxation of which is governed solely by foreign laws. *Dwight v. Boston*, *ubi supra*. *Bemis v. Boston*, 14 Allen, 366, 368. But if, as the petitioner contends, by implication the statute could be construed to comprise foreign lands a further

expansion would have to be supplied, for the mortgage also included personal property the actual value of which is not stated. There was but one debt, represented by the outstanding bonds even if their payment was secured by a mortgage of both personal and real property. The security being mixed, while the validity of the instrument was not thereby affected, no statutory method is provided for a separation, nor is there any provision that when separated the valuation of the personal property shall be deducted, leaving the statute to apply solely to the remainder, with a corresponding assessment of an equivalent part of the debt as realty. See *Harriman v. Woburn Electric Light Co.* 163 Mass. 85, 87. By St. 1903, c. 437, § 71, the real estate, machinery and merchandise of a foreign corporation are to be taxed in the town or city where they are situated, according to the provisions of R. L. c. 12. Under § 26 of this chapter, the mortgagor being in possession, the trustee could not lawfully be assessed for the interest of the bondholders in the mortgaged machinery and equipment which were taxable here as personal property in so far as they had not been annexed to and become a part of the real estate. *Troy Cotton & Woolen Manufactory v. Fall River*, 167 Mass. 517, 522, 523. And while there may be no sound fiscal reason for not including mortgages of personal property, the statute expressly refers only to realty, to which of necessity it must be confined. No plan of raising the public revenue probably can be devised which will so apportion the amount to be levied as to impose this burden with entire equality, and unless expressly relieved therefrom it is the purpose of the taxing power that all tangible property shall be subject to assessment for the purpose of defraying State or municipal expenditures, and the bond owned by the petitioner not being within any statutory exemption was properly taxable by the respondent for its market value. R. L. c. 12, § 2. *Gray v. Boston*, 15 Pick. 376, 382. *Hunt v. Perry*, 165 Mass. 287, 290. *Frothingham v. Shaw*, 175 Mass. 59, 61. *People v. McCreery*, 34 Cal. 432. *Toll Bridge Co. v. Osborn*, 35 Conn. 7. *Dyer v. Osborne*, 11 R. I. 321. *National Bank of Commerce v. New Bedford*, 153 Mass. 813, 815. *East Tennessee Land Co. v. Leeson*, 183 Mass. 87, 40.

*Judgment affirmed.*

INHABITANTS OF TISBURY vs. VINEYARD HAVEN WATER  
COMPANY.

Dukes County. October 22, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Interest. Damages. Waterworks. Tisbury. Vineyard Haven Water  
Company. Statute.*

Where interest is to be allowed on money due the computation is to be of simple interest unless there is an express requirement to the contrary.

St. 1887, c. 157, § 6, gave the town of Tisbury the right to take the franchise, corporate property and all the rights and privileges of the Vineyard Haven Water Company "on payment to said corporation of the total cost of its franchise, works and property of any kind held under the provisions of this act, including in such cost interest on each expenditure from its date to the date of taking, as hereinafter provided, at the rate of seven per centum per annum. If the cost of maintaining and operating the works of said corporation shall exceed, in any year, the income derived from said works by said corporation for that year, then such excess shall be added to the total cost; and if the income derived from said works by said corporation exceeds, in any year, the cost of maintaining and operating said works for that year then such excess shall be deducted from the total cost." *Held*, that, in case of a taking by the town, the effect of this provision was to guarantee to the corporation the return of all the money invested in the enterprise with simple interest thereon at the rate of seven per cent per annum for the length of time that it remained invested.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 11, 1905, under St. 1887, c. 157, § 6, to ascertain and fix the total cost of the franchise, corporate rights and privileges of the Vineyard Haven Water Company taken by the town of Tisbury under that statute.

The section in question is as follows:

"Section 6. The said town of Tisbury or any fire district that is or may hereafter be legally organized therein shall have the right at any time to take, by purchase or otherwise, the franchise, corporate property and all the rights and privileges of said corporation, on payment to said corporation of the total cost of its franchise, works and property of any kind held under the provisions of this act, including in such cost interest on each expenditure from its date to the date of taking, as hereinafter provided, at the rate of seven per centum per annum. If the

cost of maintaining and operating the works of said corporation shall exceed, in any year, the income derived from said works by said corporation for that year, then such excess shall be added to the total cost; and if the income derived from said works by said corporation exceeds, in any year, the cost of maintaining and operating said works for that year then such excess shall be deducted from the total cost. The said town or fire district on taking, as herein provided, the property of said corporation, shall assume all of its outstanding obligations, including the bonds authorized by this act, and the amount thus assumed shall be deducted from the total amount to be paid by said town or fire district to said corporation. In case of a foreclosure of the bonds authorized by this act, the said town or fire district may take possession of the property and rights of said corporation on the payment of said bonds, principal and interest. In case said town or fire district and said corporation are unable to agree upon the amount of the total cost of the franchise, corporate property, rights and privileges of said corporation, then, upon a suit in equity by said town or fire district, the Supreme Judicial Court shall ascertain and fix such total cost under the foregoing provisions of this act, and enforce the right of said town or fire district to take possession of such franchise, corporate property, rights and privileges upon payment of such cost to said corporation. This authority to take said franchise and property is granted on condition that the taking is assented to by said town or fire district by a two-thirds vote of the voters of said town or fire district present and voting thereon at a meeting legally called for that purpose."

The case came on to be heard before *Hammond, J.*, who at the request of both parties reserved it upon the pleadings and agreed facts for determination by the full court, such order or decree to be made therein as the law might require.

*A. E. Pillsbury*, for the plaintiff.

*J. R. Dunbar*, (*F. Brewster* with him,) for the defendant.

KNOWLTON, C. J. Acting under St. 1887, c. 157, § 6, the plaintiff took the franchise, corporate property, and all the rights and privileges of the defendant, and being unable to agree with the defendant upon the amount of the total cost of that which was taken, it brings this bill for an ascertain-



ment and fixing of this total cost in accordance with the provisions of the statute. The bill calls for a construction of the statute in that part which states the terms of the payment to be made. The language of a part of § 6 giving these terms is as follows: "On payment to said corporation of the total cost of its franchise, works and property of any kind held under the provisions of this act, including in such cost interest on each expenditure from its date to the date of taking, as hereinafter provided, at the rate of seven per centum per annum. If the cost of maintaining and operating the works of said corporation shall exceed, in any year, the income derived from said works by said corporation for that year, then such excess shall be added to the total cost; and if the income derived from said works by said corporation exceeds, in any year, the cost of maintaining and operating said works for that year then such excess shall be deducted from the total cost." The effect of this provision, in case of a taking by the town, is to guarantee to the corporation the return of all the money invested in the enterprise, with seven per cent interest upon it for the time that it remains invested. There is no provision for compounding the interest, but the statute plainly calls for simple interest only. Where interest is to be allowed on money due, the computation is to be of simple interest unless there is an express requirement to the contrary. *Dean v. Williams*, 17 Mass. 417. *Ferry v. Ferry*, 2 Cush. 92, 97. *Hodgkins v. Price*, 141 Mass. 162, 164. There is no ground for doubt as to how the computation in this case should have been made if the income each year had been exactly the same as the cost of maintaining and operating the works. Simple interest would have been reckoned on the investment for the whole period. If the cost of maintenance and operation in any year exceeded the income, it seems equally plain that the excess was to be added to the previous cost, and from that time interest was to be reckoned on the increased cost made up of the previous cost and this addition. The total cost to be paid for the property taken is to include interest on each expenditure from its date to the date of taking. The cost of maintenance and operation "in any year" is to be compared with the income "for that year," and if the excess is on one side the excess is to be added to the total

cost, if it is on the other side it is to be deducted from the total cost. The provision that interest is to be added to each expenditure from its date to the date of taking implies that the previous cost is to be modified each year when there is an excess of expenditure over the income, by including the additional cost, and that simple interest is to be reckoned on this increased cost until there is a change in some succeeding year. In like manner, if in any year there is an excess of income above the cost of maintenance and operation, there is to be a similar change by way of diminution of the cost on which interest is being reckoned. In other words, the cost to that time, increased or diminished by the excess of expenditure over income, or of income over expenditure, in any year, is to be the cost on which interest is to be reckoned for the next year, and so on up to the time of the taking. The effect of this method is to give the investors the amount of their original investment with simple interest at seven per cent for the length of time that it remains invested. The same result would be reached in another way if interest were allowed on the excess of the income above the expenditure in any year, from that time to the time of the taking and this interest deducted from the original cost, on the ground that the investors had used and enjoyed this excess of income for that time. It could hardly be contended that the corporation would be entitled to the allowance of the interest on the excess of the expenditure above the income in any year without being chargeable with interest in like manner upon the excess of income above the expenditure in any year in which the excess was on that side.

The chief argument against this construction of the statute is that the investors do not get compound interest or its equivalent by this method. But it is plain that the statute does not purport to give them compound interest. Another way of stating the same argument and objection is that, if the income considerably exceeded expenditure every year, it would be possible for the town to take the property, after a long period, without being obliged to pay anything for it, inasmuch as the application of the excess of income each year to the original investment would in time cancel it by paying back all that was put into the property, with interest. The answer to this argu-

ment is that the statute so provides. The investors get, in such a case, all that the statute intended them to get in the case of a taking. If there are profits in the business beyond this, the town is entitled to the benefit of them if it takes the property. Whether the statutory provision is liberal or illiberal is a question with which we are not now concerned. It is a provision under which the corporators were willing to act. Within the last forty years a great many statutes have been passed — more than one hundred in all — incorporating water companies, with a provision authorizing a taking by a city or town on payment for the property and franchise. These statutes differ considerably in their provisions as to the payments to be made. It is not important to consider them particularly. There is nothing in any of them that requires a construction of this act different from that which we have given it.

*Total cost to be ascertained and fixed accordingly.*

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CAROLINE M. LINDSEY, administratrix, *vs.* LEWIS J. BIRD.

Bristol. October 22, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Equity Pleading and Practice*, Memorandum of findings, Appeal. *Contract*, Validity. *Husband and Wife*.

In a suit in equity a memorandum of findings made by the judge who heard the case, consisting of a brief extract of material evidence and a statement of his findings of fact, which was made by the judge voluntarily without the request of either party, is a part of the record and has the same effect as a report made under R. L. c. 159, § 23.

In a suit in equity coming to this court by appeal, a decree, made by a judge who heard the case on oral evidence somewhat conflicting which would warrant a finding in behalf of either party, will not be reversed unless plainly wrong, especially where certain letters and other documents which were in evidence at the hearing are not before this court.

A contract by a married man by which he transfers a substantial sum of money, which practically is all the property he has, to a certain person upon the agreement and understanding that the donee shall hold and care for the money and pay therefrom any sums required for the support of the donor or which he may demand, and that on the death of the donor any sum remaining in the hands of the donee shall become his property, is not invalid as against the widow of the donor.

RUGG, J. This is a bill in equity brought by the administratrix of the estate, who is also the widow, of Henry Lindsey, to recover from the defendant certain moneys collected by him on the order of Lindsey during his life, this property being practically all which the deceased possessed. The judge of the Superior Court who heard the case filed a "memorandum of findings," which is a brief extract of certain material evidence and a statement of his findings of fact. This was made voluntarily without the request of either party. Such a memorandum is a part of the record and has the same effect as a report made under R. L. c. 159, § 23. *Cohen v. Nagle*, 190 Mass. 4. The voluminous oral testimony given before the trial court was reported by a commissioner and forms a part of the record. Certain documentary evidence is not printed, and many letters from the plaintiff's intestate to the defendant, the contents of which are not stated, were introduced in evidence, but do not form a part of the record. In the Superior Court a decree was entered dismissing the bill and ordering the defendant to pay the plaintiff her taxable costs and the defendant to take no costs. The plaintiff appealed from this decree.

In *Colbert v. Moore*, 185 Mass. 227, the court speaking through Lathrop, J., said: "The appeal brings before the court questions of fact as well as questions of law, and it is the duty of the court to examine the evidence, and to decide the case according to its judgment, giving due weight to the finding of the judge. . . . It is however true that upon an appeal from a decree of a judge in equity upon questions of fact, arising on oral testimony heard before him, his decision will not be reversed unless it is plainly wrong."

It was admitted that the defendant had received \$6,173.70 belonging to the plaintiff's intestate upon his order from the estate of one Maria M. Lindsey, and that the defendant had properly paid out \$2,006.02 from this fund on said Henry Lindsey's account. The plaintiff asserted that the transfer of this money by her intestate to the defendant was void because of lack of mental capacity in the deceased, and of undue influence exerted upon him by the defendant, and that the defendant received the money upon an express or constructive or implied trust, the nature of which was not clearly stated. These allega-

tions were denied by the defendant, who asserted that he had received the money upon the agreement and understanding that he should hold and care for it, and pay therefrom any sums required for the support of the plaintiff's intestate, or which said intestate might demand, and that upon Henry Lindsey's death any sum remaining in the hands of the defendant should become his property. The judge found that the agreement was in substance as the defendant contended, that it was not void by reason of any mental incapacity on the part of the plaintiff's intestate, that it was not entered into through undue influence of the defendant, and that it was valid and binding.

We have examined the evidence carefully, but it is not necessary to state it in detail. It is somewhat conflicting, and would warrant a finding in behalf of either party, the conclusion to be reached depending in large measure on what credence is given to the testimony of the defendant. While there are many circumstances connected with the transaction and some misleading statements made by the defendant concerning it at various times, which cast a suspicion upon his conduct and his honesty of purpose, it cannot be said on the whole that the finding was plainly wrong or that it is without justification in the evidence. The witnesses were before the judge who made the findings, and he was able to decide, from their appearance and actions in testifying, as to their truthfulness with a greater probability of being right than any one can from a mere reading of their statements in print. Moreover, the letters of the plaintiff's intestate and other documentary evidence, which were in evidence but which are not before us, may have been very material in passing upon the issues raised.

There was no illegality in the agreement made between the defendant and the plaintiff's intestate. The latter had the absolute control of his property and, so far as the plaintiff's present rights are concerned, might have given it away during his lifetime upon such terms as he pleased.

*Decree affirmed.*

*G. F. Williams*, for the plaintiff, submitted a brief.

*A. J. Jennings*, for the defendant.

## THOMAS D. WARBURTON vs. SIMON GOURSE.

Bristol. October 22, 1906. — November 28, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, &amp; RUGG, JJ.

*Practice, Civil. Estoppel. Poor Debtor. Evidence, Presumptions and burden of proof.*

A defendant in a civil action in a police, district or municipal court by consenting to the entry of a default and a judgment against him is not estopped from appealing to the Superior Court under R. L. c. 173, § 97.

In an action upon a poor debtor's recognizance, the plaintiff put in evidence docket entries of a district court constituting the record of proceedings in that court as follows: "Hearing upon said debtor's application was begun May 8, 1905, and thereupon continued to August 3, 1905, at 9 A. M., and on August 3, 1905, was further continued to September 30, 1905, at 9 A. M., on which last date nothing was done in said proceedings between the hours of 9 and 10 o'clock A. M. At 2 minutes past 10 o'clock A. M. on September 30, 1905, the debtor first called the court's attention to his presence in court, and moved to continue the proceedings herein, but this motion was overruled." Held, that the entries were consistent with the assumption that the judge of the district court had been present personally during the whole of the hour that elapsed while the debtor also had been in attendance, and that it did not appear that the creditor attended either personally or by counsel, and therefore that the plaintiff did not sustain the burden of proving affirmatively that there had been a breach of the recognizance.

CONTRACT against the surety on the recognizance of one Robinson, a poor debtor. Writ in the Second District Court of Bristol, in the City of Fall River, dated November 1, 1905.

On appeal by the defendant to the Superior Court the case was tried before *Schofield, J.*, without a jury. The plaintiff filed a motion to dismiss the appeal for want of jurisdiction, and in support of his motion produced the record of the court below, the material portion of which was as follows: "Continued to November 21, for trial, when defendant submitted and consented to a default. November 21, defendant defaulted." The judge denied the motion, and the plaintiff appealed.

The plaintiff then offered in evidence the record of the poor debtor proceedings in the Second District Court of Bristol, the material portion of which consisted of the recognizance, and the following:

"Bristol ss.

Second District Court of Bristol.

[L. s.]

Fall River, May 1, 1905."

"To Thomas D. Warburton, Samuel Robinson, arrested on execution in your favor, desires to take the oath for the relief of poor debtors, at Second District Court May 3, 1905, at 9 o'clock A. M.

"Witness, John J. McDonough, Esquire. Given under my hand and seal of said Court, at Fall River aforesaid, this first day of May A. D. 1905.

"A. B. Leonard, Clerk.

"Hearing upon said debtor's application was begun May 3, 1905, and thereupon continued to August 3, 1905, at 9 A. M., and on August 3, 1905, was further continued to September 30, 1905, at 9 A. M., on which last date nothing was done in said proceedings between the hours of 9 and 10 o'clock A. M. At 2 minutes past 10 o'clock A. M. on September 30, 1905, the debtor Samuel Robinson, first called the court's attention to his presence in court, and moved to continue the proceedings herein, but this motion was overruled."

The defendant offered oral evidence to supplement the above record, tending to show that the debtor was in the Second District Court, which was then in session, continuously from 9.30 to 10 A. M. on September 30, 1905, and to the time the motion to continue was made, in person and by his attorney, Mr. Wasserman, who during the hour from nine to ten attempted to call the court's attention to the case, but without success, and that the creditor also was present by his attorney during the hour. This evidence the judge excluded, and the defendant excepted.

The plaintiff asked the judge to make the following rulings:

1. The duty of keeping the poor debtor proceedings alive was upon the debtor throughout.

2. The court's jurisdiction was ended at the expiration of the hour of the last continuance, nothing having been done within it.

3. The debtor's failure to take any steps towards submitting himself for examination within the hour of the last continuance constituted a fatal breach of his recognizance, for which the plaintiff is entitled to recover.

4. Upon the whole record the plaintiff is entitled to recover.

The judge gave the first ruling requested by the plaintiff, but refused to give the others. He ruled that the record was consistent with the assumption of the presence of the debtor in court during the entire hour before making his motion; that it failed to show that the creditor was present, in person or by attorney, and failed to show affirmatively a breach of the recognizance, and found for the defendant.

The judge reported the case for determination by this court. If the judge's denial of the plaintiff's motion to dismiss the appeal and his rulings and refusal to rule as requested and his finding were right, judgment was to be entered for the defendant. Otherwise the finding was to be set aside, and such judgment was to be entered or such other order was to be made as law and justice might require. If judgment was ordered for the plaintiff in the penal sum of the recognizance, namely, \$400, execution was to issue for \$202.32, with interest from November 1, 1905, and costs.

*F. A. Pease*, for the plaintiff.

*D. Silverstein*, for the defendant.

BRALEY, J. It is not uncommon in practice in an action pending in a district, municipal or police court for a defendant to consent to the entry of a default, but he is not thereby estopped from taking and entering an appeal from the judgment, and the motion of the plaintiff to dismiss for want of jurisdiction was properly denied. *Preston v. Henshaw*, 192 Mass. 34. The defendant's principal having been arrested on an execution in favor of the plaintiff entered into the recognizance provided by R. L. c. 168, § 30, and duly made application to take the oath for the relief of poor debtors. A notice of the time and place appointed for the examination having been served, the only question is whether the debtor made default at the last continuance thereby causing a breach of the recognizance. The burden of proving a breach rested upon the plaintiff, and the only evidence offered was a record the material portions of which appear in the report. *Blake v. Mahan*, 2 Allen, 75. *Toll v. Merriam*, 11 Allen, 395, 397. This brief memorandum summarizing the proceedings is more in the nature of docket entries than of a formal record, which apparently has not been made, but as these minutes contain a statement of what was done, until ex-



tended they may be considered as constituting the record itself. See *Central Bridge v. Lowell*, 15 Gray, 106, 122; *McGrath v. Seagrave*, 2 Allen, 443, 444. Although meagre this record must be taken as true, and cannot be enlarged or diminished by parol evidence, for if incorrect it can only be corrected by an amendment allowed by the court or magistrate of whose judicial action it purports to be a transcript. *May v. Hammond*, 146 Mass. 439, 441. *Bent v. Stone*, 184 Mass. 92, 95. It appears that upon the return of the citation an examination was begun which was adjourned to a subsequent date, and then was further continued to a definite hour. The breach, if any, occurred at the last continuance, when, as the plaintiff contends, no judicial action was taken until an hour had expired from the time fixed. *Phelps v. Davis*, 6 Allen, 287. It was the duty of the debtor to have a magistrate present who was competent to act, and to submit himself for examination by the creditor within this period. *Hooper v. Cox*, 117 Mass. 1. *Hills v. Jones*, 122 Mass. 412. *Chesebro v. Barme*, 163 Mass. 79, 84. *Damon v. Carrol*, 163 Mass. 404, 410. When the citation was returned it plainly appears that a hearing was begun which implies that the creditor was present opposing the debtor's discharge, and began an examination, which probably for the convenience of the parties was continued from time to time. These brief recitals are sufficient to set forth in outline the history of connected acts in a judicial inquiry, and it may be presumed that throughout the hearing the standing justice of the court was present. *Stack v. O'Brien*, 157 Mass. 374. *Adams v. Pierce*, 177 Mass. 206, 207. *Bliss v. Kershaw*, 180 Mass. 99, 103. *Bent v. Stone*, *ubi supra*. The plaintiff must prove that being present himself and ready to proceed the debtor was absent, and for this purpose he relies upon the recitals that "nothing was done in said proceedings between the hours of 9 and 10 o'clock A. M. At 2 minutes past 10 o'clock A. M. . . . the debtor . . . first called the court's attention to his presence in court." That something is lacking to make this record full and complete is manifest, but the citation was issued from the Second District Court of Bristol, attested by the standing justice. By St. 1874, c. 293, § 1, that court was established, and by R. L. c. 160, § 89, it is required to be always open for the transaction of civil and criminal business.

If the debtor's examination was the only case assigned for a hearing at that time it is not to be presumed that the judge sat in the court room during the entire hour without any visual perception of the debtor's attendance, or if aware of his physical presence he did not take judicial notice of the fact until the debtor spoke. Nor is such a construction reasonable upon the record. It is not only highly improbable in view of this requirement of the statute, of which we can take judicial notice, and of the presumption that public officers perform their duty, that the further examination of the debtor was the only matter that morning for judicial consideration, but the record itself fairly implies that the debtor was present in the court room although the attention of the judge had not before been specifically directed to him. *Commonwealth v. Jeffs*, 14 Gray, 19. *Berlin v. Bolton*, 10 Met. 115, 120. *Commonwealth v. Desmond*, 103 Mass. 445. *Commonwealth v. Kane*, 108 Mass. 423, 424. *Osgood v. Kezar*, 188 Mass. 857. The recitals that no affirmative judicial action was taken within the hour, and that the debtor first called the attention of the judge "to his presence in court" after the time had momentarily expired are not the equivalent of a judicial determination that such action could not have been taken because of the debtor's absence, or that he then had appeared for the first time. They are, moreover, consistent with the presumption found by the Superior Court that the judge himself had personally been present, while the debtor also had been in attendance during the transaction of other business, who as soon as the orderly conduct of judicial proceedings permitted addressed the court. R. L. c. 168, § 42, provides that if the creditor, or some one in his behalf, fails to attend within the hour, and the debtor is present, he is entitled to his discharge as a failure to prosecute works a discontinuance of the suit. *Longley v. Cleveland*, 183 Mass. 256. Upon this question the record is silent, and as it does not appear that the plaintiff attended either personally, or by counsel, his second, third and fourth requests for rulings were rightly refused, and the ruling that a breach of the recognizance had not been affirmatively proved was correct. *Toll v. Merriam*, *ubi supra*. *Sweetser v. Eaton*, 14 Allen, 157.

*Judgment for the defendant.*

WILLIAM F. NYE & others vs. JOHN Q. A. WHITEMORE  
& others.

Bristol. October 23, 1906. — November 26, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BEALEY, & RUGG, JJ.

*Equity Pleading and Practice. Rules of Court. Corporation. Onset Bay Grove Association. Camp Meeting.*

Under Superior Court Equity Rules 21 and 31, a party to a suit in equity by a special order of court may be allowed to file exceptions to a master's report more than a year and a half after the report was filed.

In a suit in equity the following facts appeared: The Onset Bay Grove Association was created by St. 1877, c. 98, "for the purpose of holding personal property and real estate, where a wharf, hotel and other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages, under such rules and regulations as the association may prescribe." The charter further provided that "all buildings, booths or other structures erected on or attached to the grounds of the association shall for the purposes of taxation be considered real estate and taxable in the town of Wareham." The incorporators were spiritualists and established a spiritualists' resort. Camp meetings are a usual incident of such a resort and necessary for its establishment, and camp meetings were carried on by this corporation in buildings constructed for the purpose. Held, that these facts warranted a ruling that the charter impliedly authorized the corporation to use its property as a summer resort and to make it an attractive summer resort for spiritualists by providing a camp meeting there; and that it was right for a master to rule that on the facts found by him as above described "it was within the corporate powers of the association to expend money to carry on camp meetings."

BILL IN EQUITY, filed in the Supreme Judicial Court on July 16, 1898, by William F. Nye and other stockholders of the Onset Bay Grove Association, a corporation created by St. 1877, c. 98, to cancel a certain lease described in the opinion and to compel the defendant lessees to account for all moneys received by them from the leased property.

The case was referred to Arthur M. Alger, Esquire, as master. The material portions of his report are quoted in the opinion.

The master's report was filed on September 29, 1902. On April 20, 1904, the plaintiffs filed exceptions to the master's report. On the same day *Morton, J.* made the order "Motion to file exceptions allowed if court has authority to allow the same."

The plaintiffs' first two exceptions were to the following rulings made by the master:

"1. That on the facts found the plaintiffs are barred from questioning the authority of the corporation to carry on camp meetings, and that it is accordingly not open to them to assail the lease, on the grounds that it was an evasion of the charter of the Onset Bay Grove Association.

"2. That on the facts found by the master it was within the corporate powers of the association to expend money to carry on camp meetings."

There were two other exceptions, which were not argued.

On December 15, 1904, *Braley, J.* made the following final decree:

"And now this case came on to be further heard at this sitting, on the coming in of the master's report, and was argued by counsel upon the exceptions alleged by the plaintiffs to the report on April 20, 1904; and thereupon, upon consideration thereof, it appearing that all the payments required to reimburse the corporation, and, as found by the master, having been fully paid to it, it is ordered, adjudged, and decreed that said alleged exceptions be overruled, and the master's report confirmed, and the lease heretofore made by the corporation to the individual defendants be adjudged void and of no effect, and that the motion of the plaintiff Nye to be allowed his disbursements for counsel fees and expenses taxed as between solicitor and client, and the motion of the defendants for reimbursement for money paid for taking evidence, all to be paid by the corporation, are severally denied."

The plaintiffs appealed.

*J. L. Gillingham*, for the plaintiffs.

*T. E. Grover*, for the defendants.

KNOWLTON, C. J. This is a bill brought by stockholders of the Onset Bay Grove Association to set aside a lease made by the corporation to an association of individuals, all of whom were directors of the corporation. We assume, in favor of the plaintiffs, that the exceptions to the master's report were properly allowed to be filed after the expiration of fifteen days, under a special order of the court. Superior Court Equity Rules 21, 31. *Dolan v. Boott Cotton Mills*, 185 Mass. 576. See *Hack v. Nason*, 190 Mass. 846.

The most important question in the case is whether this cor-

poration, which was created by St. 1877, c. 98, has power under its charter to conduct a camp meeting on its grounds. The statute is peculiar. By the first section the nine incorporators and their associates and successors are "made a corporation by the name of the Onset Bay Grove Association to be established and located in the town of Wareham, for the purpose of holding personal property and real estate, where a wharf, hotel and other public buildings may be erected and building lots sold or leased for the erection of private residences or cottages, under such rules and regulations as the association may prescribe." The capital stock is to be not less than \$2,500 nor more than \$25,000. Section 3 provides that "All buildings, booths or other structures erected on or attached to the grounds of the association, shall for the purposes of taxation be considered real estate and taxable in the town of Wareham." By § 4 it is made the duty of the officers or agent of the association to furnish annually to the assessors of the town a list of the names and residences of all owners of buildings or other taxable property erected upon the grounds of the association.

There is nothing in the statute, except that which we have stated, to show what the business of the corporation is to be, or what it is to do with the property that it is to hold. Enough appears, however, to show that it may use the property in some proper way. The meaning is the same as if the words "and using" were inserted in the statute after the words "for the purpose of holding." A wharf, hotel and other public buildings may be erected, as well as private buildings, booths and other structures. The express authority to the corporation is only to hold the property. The nature of the implied authority to use it must be ascertained by inference from the language of the statute, and from the conditions and circumstances existing at the time of its enactment. A part of the findings of the master are as follows:

"2. It appears from the evidence outside the charter, that the incorporators of the Onset Bay Grove Association were spiritualists, and that they came together for the purpose of acquiring and developing some place upon the seashore as a summer resort for spiritualists and incidentally as a site for spiritualists' camp meetings. Pursuant to this purpose the cor-

poration when formed purchased a large tract of land on Onset Bay in the town of Wareham, and proceeded to lay out parks, streets and building lots, to construct a wharf, and to erect cottages, an auditorium and a temple for the holding of camp meeting exercises, and other buildings. Many lots were sold, principally to spiritualists, and cottages built thereon by the owners; hotels, boarding houses and stores were put up by individuals, and the place, under the name of Onset, in time became well known as a popular summer resort largely frequented by spiritualists, and also by others attracted by the natural advantages of the locality. In June, 1877, public exercises were held in the auditorium on the grounds of the corporation, under the auspices of the corporation, for the purpose of dedicating the grounds 'to the principles of spiritualism.' In the month of July following, the corporation held a camp meeting, and continued to hold such meetings annually, without question, until 1895.

"These meetings were largely attended both by cottagers and by persons from abroad, and undoubtedly constituted 'a principal feature of the resort.' The services at the meetings consisted of addresses on spiritualism by speakers engaged for the purpose, and music furnished by a band. The meetings were held in the auditorium or in the temple and were arranged by and under the control of the corporation. All the expenses, including such items as police service, advertising, printing, speaking and music, were paid by the corporation.

"3. If Onset was to be developed as a spiritualist summer resort, it was obviously necessary to establish the meetings in question in order to attract spiritualists to the place.

"A spiritualist summer resort is a place in the country or at the seashore where spiritualists gather during the summer months to attend, in the course of vacation or outing, the public exercises of their sect conducted under the name of camp meetings. It does not appear that the corporation had any means of maintaining these meetings at Onset other than by carrying them on itself; and as a practical matter it would seem that if the meetings were to be held it was necessary for the corporation to undertake them. Camp meetings are ordinarily held in tents or booths, but they are sometimes held and may be more conveniently held in buildings of a permanent character. The

auditorium erected by the corporation was designed for meetings in the open air in pleasant weather, and the temple for indoor meetings in rainy weather. If camp meetings were to be carried on at Onset, the erection of these buildings for the purpose was proper and reasonably necessary.

"4. At the outset and until the year 1895 it appears to have been assumed by all persons in interest that the corporation had power under its charter to carry on camp meetings, and that to do so was one of the objects of its existence. The meetings were conducted by the corporation until 1895, a period of eighteen years, with the knowledge and consent of all the stockholders. . . . It further appears that Mr. Nye was a promoter of the corporation, and one of the incorporators, and that as such he agreed with his associates that the corporation when formed should purchase the land referred to at Onset, and develop it as a spiritualist summer resort by carrying on camp meetings."

In 1895 the plaintiff Nye, who as a stockholder and director of the corporation had actively participated up to that time in carrying on the camp meetings, came to the conclusion that, as a matter of business policy, it was desirable that the corporation should cease to hold such meetings. He attempted unsuccessfully to induce his associates to give up that part of their enterprise, and, after efforts of different kinds, (see *Nye v. Storer*, 168 Mass. 53; 1, Opinion of Attorney General, 642,) he sold one share of stock to each of the other plaintiffs in this suit, and he and they brought the bill which is now before us. In the meantime his associates upon the board of directors had made a lease to themselves as an association of individuals for the term of seven years from July 1, 1895, which included nearly all the property of the corporation, with a stipulation that the rent to be paid should be one half of the net profits from the use or occupation of the premises. The master has found that the lease was made without any motive of personal gain to the lessees, but because it was feared that the corporation could not lawfully maintain the camp meetings, and because they desired to evade the law if the law forbade the maintenance of such meetings by the corporation.

The master has found that the lease was void, as made under a secret trust which involved a method of carrying on the cor-

porate business unauthorized by the charter, because it put all the property of the corporation into the control of others than its officers for a term of years. No exception was taken to the findings of the master in this particular, and we need not consider them in detail.

The master's conclusions of law upon the main question are stated in the report in part as follows:

"5. The act expressly empowers the corporation to erect and hold public buildings. . . .

"6. The term public buildings in the act is unaccompanied by words of explanation or limitation. Whether or not, then, it is used in such a sense as to include camp meeting buildings depends upon the general scheme or object of the act.

"7. The incorporation of the associates named and the powers specifically granted them, namely, to hold real and personal property in Wareham, to construct a wharf, to erect a hotel and other public buildings, and to lease and sell lots for the erection of cottages and private residences, taken in connection with the corporate name adopted by the associates, 'Onset Bay Grove Association,' show plainly, in the absence of any qualifying words, that the object intended and authorized by the act was the formation of a corporation for the purpose of establishing a summer resort of such kind as the corporation might determine, on Onset Bay in the town of Wareham.

"8. The corporation, as matter of fact, determined to establish a spiritualist summer resort. That was within the object of the act, and was to be expected, the incorporators being spiritualists. As a matter of fact, camp meetings are a usual incident of a spiritualist summer resort and are necessary to its establishment. That the Legislature had this in mind and proceeded upon the theory that the corporation was to carry on camp meetings may be gathered from the title of the act, 'The Onset Bay Grove Association,' and from the provision in the act for the taxation of booths on the grounds of the association. Camp meetings are usually located in a grove and are held in booths. (See title 'Camp Meeting' in 5 Am. & Eng. Encyc. of Law, 2d ed., 109.) As no probable purpose is apparent, other than the holding of camp meetings, which would call for the erection of booths upon the grounds of the corporation, the inference is



that it was contemplated that they should be erected for that use. While camp meetings are held in buildings of a temporary nature known as booths, they may be more conveniently held in buildings of a permanent character. In view of the indications in the act that it was understood that camp meetings were to be carried on, and taking into account the propriety and necessity of erecting buildings for camp meeting purposes in order to carry out the object of the act, it seems reasonably certain that the term 'public buildings' in the act, is used in such a sense as to include camp meeting buildings. The act is, therefore, to be construed as conferring upon the corporation an express power to erect and hold buildings in which to carry on camp meetings. This construction is not inconsistent with any of the provisions of the act and best harmonizes with its object. It violates no law or policy of the state, and it accords with the practical construction of the act by all persons interested, uninterruptedly for eighteen years.

"9. An express power to erect and hold buildings suitable for camp meeting purposes thus appearing, the authority must be implied, as a necessary incident of that power, to employ the usual and proper means of utilizing the buildings for the purposes for which they were erected. What is usual and proper in a given case depends upon the circumstances of the case. To illustrate: Buildings designed for use as stores are, as a rule, built to be let to persons desiring to engage in the business of keeping a store. If a corporation should be chartered to acquire land and build stores thereon, it would not be necessary or contemplated that the corporation should carry on the grocery or dry goods business in its stores. On the other hand, a church is not ordinarily built with a view to leasing it. If a body of Unitarians should obtain a charter to erect and hold a church building, it would be understood that they were to carry on in it the services of their denomination, and to do so would be the usual and proper means of utilizing the building. On the facts which I have found, it appears to me that the carrying on of camp meetings by the corporation in the buildings which it erected for the purpose is a proper and usual means of giving effect to the power to erect and hold such buildings, and that it is a necessary incident of that power."

Little need be added to the findings and reasoning of the master on this point. There are different provisions in the act of incorporation which indicate that the association was not to be an ordinary land company, but was to occupy and use its property as an association. The provisions as to taxation and notices to the assessors imply that booths or small cottages, which would not be real estate, were expected to be built and owned by individuals. It was expected that the wharf and hotel and other public buildings might be used by the corporation in connection with its enterprise. The sale and lease of building lots for the erection of private residences or cottages is to be "under such rules and regulations as the association may prescribe." In this there is an implication that the corporation would be so connected with the management and use of the property as to desire rules and regulations for the holding by individuals.

The conclusion of the master that the statute impliedly authorizes a use of the property by the corporation as a summer resort is well warranted, and the finding of authority to make it a summer resort especially attractive to spiritualists, and for that purpose to provide for a camp meeting there, is equally warranted.

The second exception to the master's report is therefore overruled. The view that we have taken of this part of the case makes it unnecessary to consider the first exception, which presents the only other questions argued by the plaintiffs.

*Decree affirmed.*

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ROMEO PAQUETTE vs. PRUDENTIAL INSURANCE COMPANY  
OF AMERICA.

LEON LANGDEAU vs. SAME.

Hampden. September 25, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

*Evidence, Materiality, In rebuttal, Presumptions and burden of proof. Practice, Civil, Exceptions. Witness, Contradiction. Insurance, Life. Words, "Application."*

In an action on a policy of life insurance where the defendant's answer contains a general denial, the proofs of death required by the terms of the policy are material to the plaintiff's case and so are admissible in evidence.

If documents which are admissible in evidence only on a particular issue are put

in evidence generally against the general objection and exception of the adverse party, it is within the discretion of the presiding judge either to submit such documents to the jury or to withhold them, and to the exercise of this discretion no exception lies.

If documents are admitted in evidence generally which are admissible only on one issue, and the party against whose objection and exception they have been admitted does not ask for an instruction limiting their use to the special purpose for which they were offered, he afterwards cannot complain that their use was not so limited.

Previous material statements made by a witness contrary to those in his testimony are admissible for the purpose of contradicting him.

In an action on a policy of life insurance where witnesses for the defendant have testified that the insured when he took out the policy appeared to be of unsound health and that his appearance gave indications of the excessive use of intoxicants, the plaintiff may be allowed to introduce evidence to rebut this testimony.

Where a policy of life insurance incorporates by reference the application of the insured, the word "application" includes all the questions and answers on both sides of the paper containing the application which are signed by the insured, including the declarations made and signed by him in the presence of the medical examiner of the insurer and excluding only the medical examiner's report.

In an action upon a policy of life insurance which incorporates by reference the application of the insured, where there was attached to the policy a copy of the contents of one side of the paper on which the application was written with the signature of the insured but no copy of the contents of the other side of the paper containing the declarations made and signed by the insured in the presence of the medical examiner of the defendant, the defendant under the provisions of R. L. c. 118, § 73, cannot introduce in evidence a question and an answer of the insured thereto which are written on such other side of the original paper no copy of which was attached to the policy.

In an action on a policy of life insurance, if the defendant offers in evidence the answer of the insured to a question on the back of his application, no copy of which was attached to the policy, and seeks to have it admitted as a misrepresentation which was part of a general scheme of fraud, it is not enough to make this evidence admissible that the defendant in his answer alleged a fraudulent conspiracy to obtain a series of policies on the life of the insured. Before such evidence can be admitted the defendant must have laid a foundation for it by previous evidence of fraud.

In an action on a policy of life insurance, an answer of the insured to a question on the back of his application, which under the provisions of R. L. c. 118, § 73, cannot be admitted in evidence because no copy of the contents of the back of the application was attached to the policy, is not made admissible by the fact that a copy of the face of the application, which was attached to the policy, has been admitted in evidence without any objection by the plaintiff.

In an action on a policy of life insurance, if the defendant sets up in his answer that the policy was made voidable by material misrepresentations of the insured as to his health and habits of sobriety, the burden is on the defendant to prove these allegations.

**TWO ACTIONS OF CONTRACT** brought by different plaintiffs upon separate policies of insurance issued by the defendant at the

same time upon the life of one Arthur Paquette, based upon an application made by Paquette, which application was referred to in and made a part of the policies. Writs dated June 16, 1905.

In the Superior Court the cases were tried together before *Crosby, J.* with a third case of *Leon Langdeau vs. the John Hancock Mutual Life Insurance Company* on other policies upon the same life.

The plaintiffs put in evidence the policies sued on. Each was for the sum of \$500 payable to the executors, administrators or assigns of the insured, and they had been assigned for value to the respective plaintiffs. The plaintiffs offered in evidence the proofs of death under the two policies. These were admitted by the judge against the objection and exception of the defendant. It was agreed that these proofs of death had been received by the defendant, and they were produced at the trial by the defendant at the request of the plaintiffs.

The defendant offered in evidence a paper marked "O" which was identified by Dr. Fletcher, the defendant's medical examiner, as bearing his signature and as containing the answers to questions made by Arthur Paquette in the presence of Dr. Fletcher, the answers to such questions being signed by Arthur Paquette in the presence of the examiner. Question and answer No. 7 were "Have you ever used malt or spirituous liquors to excess? A. No." The judge ruled that the medical examiner's report was not a part of the application for insurance and not a part of the contract of insurance and not attached to the contract, and excluded the question and answer in the exhibit.

It was agreed that a correct copy of so much of the paper marked exhibit "O" as was entitled "Application for Intermediate Policy in the Prudential Insurance Co.," down to and including the signature of Arthur Paquette on the same side of the paper and the date September 7, 1904, was attached to each policy in suit, but that no copy of the contents of the other side of the paper containing the declarations made and signed by the applicant in the presence of the medical examiner, including the question and answer above quoted, was attached to either of the policies.

The other exceptions relating to evidence are described in the opinion.

At the close of the evidence the defendant asked the judge to instruct the jury to find for the defendant.

He also requested the following rulings in each case:

The burden of proof is upon the plaintiffs to show that at the date of the delivery of the policies the person insured was in good health.

The defendant is entitled to rely upon the representations and answers made by Arthur Paquette to Dr. Fletcher and written down by him and signed by Paquette.

The burden of proof is upon the plaintiffs to show that upon September 7, 1904, Arthur Paquette was of sober and temperate habits.

The judge refused to make any of these rulings.

The defendant excepted to the following rulings made by the judge at the request of the plaintiffs:

15. The fact that the assignee had no insurable interest in the life of the insured is neither conclusive nor *prima facie* evidence that the transaction is illegal.

19. The defendants must prove by a fair preponderance of the evidence that at the time when the applications were made and the policies were issued the insured was addicted to the excessive use of intoxicating liquors.

22. In the Prudential cases, the burden of proof is upon the defendants to establish the fact that the insured was not in good and sound health upon the date the policies were delivered.

The defendant's exceptions to the giving of the instruction numbered 15 was waived.

The judge submitted to the jury the following questions, to which the jury made the following answers:

"1. Was Arthur Paquette, the person insured, in good health on the day of the date of the two policies issued and delivered to him by the Prudential Life Insurance Company in September, 1904? Ans. Yes.

"2. Was Arthur Paquette, the person insured, of sober and temperate habits on September 7, 1904, the date when he made application for two policies of insurance in the Prudential Life Insurance Company? Ans. Yes.

"3. Was Arthur Paquette, the person insured, in good and sound health at noon on December 14, 1904, the date when the

two policies of insurance were issued on his life, by the John Hancock Mutual Life Insurance Company? Ans. Yes.

"4. Had Arthur Paquette, the person insured, ever used ardent spirits, wine or malt liquors to excess prior to December 4, 1904? Ans. Yes.

"5. Was Arthur Paquette, the person insured, on December 4, 1904, the date when he made application for insurance in the John Hancock Mutual Life Insurance Company, addicted to the excessive use of intoxicating liquor? Ans. No.

"6. Did Arthur Paquette, the insured, have consumption in September, 1904? Ans. No.

"7. Did Arthur Paquette, the insured, have an organic and incurable disease of the heart in September, 1904? Ans. No.

"8. Did Arthur Paquette, the insured, have consumption on December 14, 1904? Ans. No.

"9. Did Arthur Paquette, the insured, have an organic and incurable disease of the heart on December 14, 1904? Ans. No."

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

*H. P. Small*, for the defendant.

*J. F. Malley & D. J. O'Connor*, for the plaintiffs.

BRALEY, J. These cases were tried together, and the exceptions raise certain questions relating to the admission and exclusion of evidence, to the refusals to rule as requested, and to the rulings given. Under the terms of the contracts the plaintiffs were required to prove the death of the insured to the satisfaction of the company before the amount of the insurance became payable. If this event had been admitted by the pleadings, or at the trial, any real or supposed prejudice affecting the defence which the answers to certain of the questions propounded by the company may have contained would have been avoided. Instead of making such admission, among other allegations, the defendant's answer contained a general denial, which put in issue this material fact, and therefore the papers constituting the proofs of death became relevant. The defendant argues that if admitted for this limited purpose, they should not have gone to the jury as they tended to impair its defence to the other issues on trial. Having been put in evidence generally, it was within

the discretion of the presiding judge either to submit or withhold them from the consideration of the jury, and to the exercise of this discretion no exception lies. Besides the defendant might have asked for an instruction limiting the use of these papers to the special purpose for which they had been offered, but having neglected to make this request it has no just ground of complaint that the evidence subsequently was not limited. *Burghardt v. Van Deusen*, 4 Allen, 374, 375. *Krauss v. Cope*, 180 Mass. 22. See *Jennings v. Rooney*, 183 Mass. 577, 584; *O'Driscoll v. Lynn & Boston Railroad*, 180 Mass. 187, 189.

When a witness has made material statements contrary to those given by him in his testimony such statements may be introduced for the purpose of contradicting him, and the admission during the cross-examination of Dr. Cooley, a witness called by the defendant, of a medical certificate signed by him in which he stated that he had examined the insured on September 19, 1904, was competent for the purpose of contradicting his previous evidence that he had not made an examination at that time. *Handy v. Canning*, 166 Mass. 107, 109. See *Jennings v. Rooney*, *ubi supra*; *Robinson v. Old Colony Street Railway*, 189 Mass. 594, 596. The description of the physical appearance of the insured in the evidence in reply also was competent to rebut the testimony of the defendant's witnesses that he appeared to be in unsound health, and that his general appearance showed indications of the excessive use of intoxicants.

The remaining and principal exception is to the exclusion of a negative answer to an inquiry whether the insured ever had used malt or spirituous liquors to excess. A policy of life insurance may contain conditions not found in the application, but outside of an independent agreement the application and policy together usually form the contract. *Commonwealth Ins. Co. v. Knabe Manuf. Co.* 171 Mass. 265, 270. *Millard v. Brayton*, 177 Mass. 533, 537. In themselves these policies contained neither the medical examination and the agreement of the application therewith connected, nor any express condition that as such they were included. It is plain, however, that they were intended to be incorporated, as these declarations and answers relating to his past and present condition of health and family history were essential inquiries which upon their face showed that the life

proposed was an insurable risk. But if not found in the policies, then resort must be had to the paper called the application, which by reference is incorporated. It would be a narrow construction to say that the first page of this paper alone constituted the negotiations, when the second page contained the declarations and statements of the insured without which a policy would not have been issued. The term "application" as there used was intended to include and did include all the statements on both pages except the medical examiner's report which were considered necessary to form the basis of an intelligible and consistent contract of life insurance, and as thus defined the purpose of the parties is made effectual by a uniform construction which gives effect to every material portion of the entire contract. *McCoy v. Metropolitan Ins. Co.* 133 Mass. 82, 85. *Millard v. Brayton*, *ubi supra*. The copy of the application attached to the policies did not contain the question and answer excluded, and because no copy of the declarations and answers in which they are found was annexed they were not admissible under the statute. R. L. c. 118, § 78. *Nugent v. Greenfield Life Assoc.* 172 Mass. 278. *Johnson v. Mutual Ins. Co.* 180 Mass. 407. The defendant, moreover, relies upon the exception that whenever a scheme of actual fraud in procuring the insurance, of which the negotiations formed a part, is pleaded and shown, then even if the application is not attached it may become material, and admissible with other evidence on this issue. *Carrigan v. Massachusetts Benefit Assoc.* 26 Fed. Rep. 230. *Holden v. Prudential Ins. Co.* 191 Mass. 153. In the first paragraph of the answer it is alleged that a conspiracy fraudulently to obtain a series of policies upon the life of the insured was planned by him and the plaintiffs, and that in pursuance of their plan policies were written by some of the companies to whom they applied, although other companies declined the risk because of his unsound condition of health. This defence seeks to avoid the policy, not because of a single material misrepresentation, but of a concerted plan which existed at the inception of the contract to defraud the insurer, who for this reason did not become bound. But the statute would be rendered nugatory if under the guise of this defence an unattached application was admitted without a previous foundation being laid, and some evidence at least must



first be offered to sustain such an allegation before an application not otherwise admissible can be introduced. While upon proof that such a conspiracy had been formed similar transactions which were a part of the general scheme would have been admissible to prove fraudulent intent, the defendant failed to supply this evidence. *Jordan v. Osgood*, 109 Mass. 457, 461. *New York Ins. Co. v. Armstrong*, 117 U. S. 591. The exclusion, therefore, of so much of the second page of the exhibit as contained these declarations was right, even if the first page had previously been admitted without any objection by the plaintiff, and the defendant's eleventh request was properly refused.

We do not consider the exception to the giving of the plaintiffs' fifteenth request as it has been waived, and the defendant's remaining requests also were rightly refused, and the rulings given correctly stated the law. By pleading that the policies were avoided by the material misrepresentations of the insured as to his health and habits of sobriety, the burden rested on the defendant to prove these allegations, which if established would have worked a forfeiture of the insurance. *Cluff v. Mutual Benefit Ins. Co.* 13 Allen, 308, 316. *Campbell v. New England Ins. Co.* 98 Mass. 381. *Ferguson v. Union Ins. Co.* 187 Mass. 8. *Kidder v. United Order of the Golden Cross*, 192 Mass. 326, and cases cited.

*Exceptions overruled.*

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EMILY A. BLACKWELL, executrix, vs. OLD COLONY STREET  
RAILWAY COMPANY.

Bristol. October 22, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

If a man of middle age starting on foot to cross a street, where he knows that there are parallel street railway tracks over which cars pass frequently, sees before him on the nearer track a line of stationary cars which obstruct his view of the track beyond, and walking over the first track on a cross walk between

two of the cars standing still about three feet apart and being startled by hearing a bell or two bells ring on one of them, hurries to the middle of the farther track without first looking or listening and is struck by a moving car and is injured, he is not in the exercise of due care.

TORT for personal injuries from being struck by an electric car owned and operated by the defendant on Main Street in Brockton at about half past five o'clock in the afternoon of October 24, 1901. Writ dated February 3, 1902.

The action was brought by Theodore D. Blackwell, who sustained the injuries. Later, on the suggestion of his death, Emily A. Blackwell, the executrix of his will, was admitted to prosecute the action.

In the Superior Court the case was tried before *Wait, J.* A statement signed by the original plaintiff, Theodore D. Blackwell, was admitted in evidence. His account of the accident was as follows:

"I am forty-nine years old; was working on shoes for Fred Allen in G. Snow's shop on Lincoln Street, Brockton. On October 24, 1901, Thursday, I left shop at 5.30; walked down right hand side of Lincoln Street to School Street; stopped at School Street and talked with a man four or five minutes; saw clock on City Hall; it was 5.35 P. M. I left the man and walked on right side of School to Main Street. On the north bound track there were a number of cars in line standing still, I think blocked, and a space about three feet wide between two cars on the cross walk or flagging. People were coming and going between these two cars. A man went in between them ahead of me; he was a young man about five feet eight inches tall, dark clothes, dark complexion, smooth face, about twenty-five to thirty years old. There were about eight or ten feet between the young man and myself. He was going faster than I and had passed me.

"I was about in middle of the end of the cars and between them when a small bell in the front end of the back car rang once or twice; I think it was two bells; almost positive there were two bells.

"I then made a quick step into a run, fearing I would be jammed between these two cars. As I came out into the middle of the south bound track I saw the car on that track right on

me, coming fast. I made a leap to get out of the way and was struck in the right leg about half way between the ankle and the knee and knocked off my feet. I think I took one or two blundering steps before I fell and then went down in a heap on my right side.

"I heard no gong or bell from the south bound car and had no idea it was coming."

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant upon the ground that there was no evidence to be submitted to the jury that the plaintiff's testator at the time of his injuries was in the exercise of due care. The judge refused to rule upon any other issue, stating that as all the evidence in the case had not been introduced he would not rule upon the question whether there was any evidence of negligence on the part of the defendant. The plaintiff alleged exceptions.

*E. R. Anderson*, (*A. T. Smith* with him,) for the plaintiff.

*D. E. Hall*, for the defendant.

HAMMOND, J. The accident happened in broad daylight, upon a wide, straight street. Aside from the line of stationary cars on the north bound track and the moving car upon the south bound track, there were no teams or other vehicles upon the street to impede the progress of the plaintiff's testator or to affect his movements. He was of middle age, was familiar with the locality, and must be presumed to have known that there were double tracks and that cars frequently passed over them.

Under such conditions he undertook to cross the street. Having passed from the sidewalk to the north bound track, he passed over that track between two of the cars there standing still, then proceeded over the space between the two tracks and got to the middle of the south bound track, when for the first time he saw the south bound car then close upon him. During all this time, from the time he left the sidewalk until he was struck, it is not shown that he had either looked or listened for a car upon the south bound track. It is true that there is evidence that before crossing the north bound track he "hesitated"; and it is argued by the counsel for the plaintiff that the jury might have found that he was then looking or listening. But the cause of his hesitation is the merest conjecture, and moreover it is plain that

looking could do no good at that time because of the obstruction to his vision. It is perfectly plain from his own statement and from the evidence of the witness Read, who crossed immediately before him, that at the time the testator was about to step upon the south bound track he must have known of the near presence of the moving car had he taken any precaution whatever to ascertain.

It is argued however by the plaintiff that the ringing of the bell of the car standing still upon his left as the testator crossed the north bound track was a negligent act of the defendant, or that at any rate it indicated to the testator that he was in a place of peril and must hastily seek a place of safety; and, therefore, that his failure to make any effort to look or listen for a moving car upon the south bound track was excusable. But this position is untenable. Under the circumstances the act of ringing the bell cannot be regarded as a negligent act. Nor was the peril of the starting of the car in a line of cars still standing so great as to justify the testator in getting upon the track where there might be a moving car without taking reasonable care to see the danger which might be lurking there. The ruling that there was no evidence of his due care to be submitted to the jury was correct. See *Saltman v. Boston Elevated Railway*, 187 Mass. 243, and cases there cited.

*Exceptions overruled.*

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WILLIAM NORRIS, JR. vs. DAVID M. ANTHONY & another.

Bristol. October 22, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence. Agency. Master and Servant.*

It is not as matter of law negligence on the part of a woman in charge of her grandchild one year and nine months old to take the child with her in going to the clothes line in a good sized door yard to see if a few things she needs are dry and temporarily to leave him inside the gate of the yard which usually is open from whence he goes into the street and is run into and knocked over by a wagon.

In an action by a child, one year and nine months old when injured, for personal injuries from being run into and knocked over by a meat wagon of the defendant, where there is evidence that the driver was walking his horse in broad daylight in a wide, straight street, and before he saw the child saw an acquaintance to whom he spoke, in doing which he turned his head around away from the side where the child was, if the driver testifies that he saw some boys standing at a watering trough on the other side of the street and that he did not see the child until he was six inches from the hub of his front wheel, and another witness testifies that when the team struck the child the driver's head was turned looking behind him on the side away from the child and that there were no other teams "around there," there is evidence for the jury of negligence on the part of the driver.

In an action against two defendants named respectively A. and S. and alleged to be partners carrying on business under the firm name of A. S. and Company, for personal injuries alleged to have been caused by the negligence of the driver of a team of the defendants, there was ample and uncontradicted evidence that the driver of the team which injured the plaintiff was in the employ of A. S. and Company at the time of the accident, but the defendants contended and introduced evidence to show that this name was used by a certain corporation, and it did not appear that one of the defendants ever had been in the city where the accident occurred or that the other defendant was at the place of business of A. S. and Company except "once in a while." The manager of the business testified that the defendants "were simply stockholders in the corporation." Neither of the defendants appeared at the trial, and no charter of the alleged corporation was produced; there was no evidence of the proceedings for its incorporation nor were any of its books shown. *Held*, that the question of the connection of the defendants with the business in which the driver was employed was one for the jury.

In an action against persons alleged to be carrying on business as partners for injuries caused by the negligence of a person alleged to have been in the defendants' employ, where the defendants deny the existence of the partnership, if a witness for the plaintiff testifies that the concern employing the negligent servant was a partnership consisting of the defendants whose names appeared in the firm name, and afterwards on cross-examination testifies that his knowledge on this subject is derived solely from the directory, and the presiding judge instructs the jury to disregard the evidence as mere hearsay, this is a compliance with a motion of the defendants to strike out the evidence, and is correct.

TORT against David M. Anthony and E. C. Swift, described as partners, doing business under the firm name of Anthony, Swift and Company, for personal injuries from being run over or knocked down by a horse and wagon driven by one Bly alleged to have been a servant of the defendants on Mott Street in Fall River on November 4, 1904. Writ dated January 21, 1905.

In the Superior Court the case was tried before *Bell, J.* The plaintiff at the time of the accident was one year and nine months old and was in charge of his grandmother who lived on the west side of Mott Street.

The contentions of the defendants and the evidence in support of them are stated in the opinion.

The witness Pritchard, mentioned near the end of the opinion in the paragraph numbered 4, was a deputy sheriff and testified for the plaintiff that he had lived in Fall River for a great many years; that he knew of the place there run by Anthony, Swift and Company; that he had occasion as a deputy sheriff to serve papers on Anthony, Swift and Company since 1904; that he knew the concern of Anthony, Swift and Company in business there previous to November, 1904; and that he believed the concern consisted of E. C. Swift and David Anthony.

On cross-examination he testified that he had knowledge of the fact that there was a place there on Plymouth Avenue with a sign marked Anthony, Swift and Company, but that his knowledge that Anthony, Swift and Company consisted of David M. Anthony and E. C. Swift was derived from the directory, in which he had had occasion to look it up at different times.

The counsel for the defendants asked that the evidence be stricken out. The judge afterwards charged the jury on this matter as follows:

"I instruct you that so far as the evidence came from the directory as to who was in this firm, or who was a firm, that you are to disregard it, because it is mere hearsay evidence; it has no authority in court. All that was offered in any directory I think I excluded at the time, but all that was offered on cross-examination, that is, if it came second hand, if it came through a witness, if a witness said that he knew that a firm was Swift and Anthony and it appeared that all the source of knowledge he had was from the directory, we are back to the directory again, and the stream does not rise higher than its source, and his quoting the directory to you here or giving the contents of the directory here has no additional validity because it has so passed through his mind on the way rather than been read to you direct from the book, so far as the evidence shows it you will leave out of your consideration that which has no better foundation, no better source, than the directory."

At the close of the evidence the defendants asked the judge to make the following rulings:

1. The defendant Swift is not liable.

2. The defendant Anthony is not liable.
3. The driver of the wagon was not negligent.
4. The plaintiff was not in the exercise of due care.
5. The plaintiff's caretaker was not in the exercise of due care.

8. There is no evidence that the defendants were partners.

9. There is no evidence that the defendant Swift employed the driver.

10. There is no evidence that the defendant Anthony employed the driver.

11. The evidence of Pritchard as to who composed the firm of Anthony, Swift and Company should be stricken out.

13. The jury should find for the defendants.

15. There is no evidence that the defendants employed the driver.

17. The evidence that the defendants constituted the partnership is hearsay and should be stricken out.

The judge refused to make any of these rulings except so far as quoted above, and instructed the jury that in order to hold the defendants liable the plaintiff must show that the relation of master and servant, employer and employee, existed between Bly and the defendants.

The jury found for the plaintiff in the sum of \$1,200; and the defendants alleged exceptions.

*J. W. Cummings*, (*C. R. Cummings* with him,) for the defendants.

*M. Druce*, for the plaintiff.

HAMMOND, J. The defendants contend that there was contributory negligence upon the part of the grandmother who had the care of the child, that Bly, the driver of the team, was not negligent, and that there was no evidence that at the time of the accident he was acting as the servant of the defendants. Upon each of these three points the case is very close and the evidence such that a finding for the defendants upon each of them might well have been expected.

1. As to the care exercised by the custodian. She testified "It was around two o'clock and the child was in my care, and I had an occasion to go to the clothes line to ascertain if I had a few things dry that I needed, and I took the child with me, and it

was a lovely day, and I left him inside the gate\* and then the next minute I heard a cry and I saw the child lay in the road and the man running to pick it up." The man was Bly, who had alighted from his team and had reached the child. There was evidence that the child had been across the street and was returning at the time of the accident; and further that he had been playing on the other side of the street "five or ten minutes" before he attempted to recross the street. While it is true that the mere presence of the plaintiff upon the street unattended was *prima facie* evidence of the negligence of the grandmother (*Gibbons v. Williams*, 185 Mass. 333), still, if the jury believed the grandmother, they may have found that she had only temporarily lost sight of the child under circumstances which reasonably justified her in doing so and in thinking no harm would come to him; and that in all she did or omitted to do she was reasonably careful. Such a finding was warranted by the evidence. See *Walsh v. Loorem*, 180 Mass. 18, and cases there cited.

2. As to the negligence of Bly, the driver of the team.† Delia Nelmes, called by the plaintiff, testified that she was looking out of the window in the building where the plaintiff lived, and saw the wagon pass at a walk; that the plaintiff came from a yard on the other side of the street, walking "not straight across the road but in a side line"; that the wagon was about in the middle of the street; that as the wagon went by "the back wheel furthest away from her" struck the child and the child fell on the further side of the wagon from her; that when the team struck the child Bly's head was turned, looking behind him to the north on the side farthest from her (which apparently was in the direction of the place where the child was when hurt), and that there were no other teams "around there." On cross-examination she said that she did not see the wagon strike the child or run over it; that the team was going south, and that she "heard the driver holler," and that the plaintiff then fell. Edward Nelmes, a boy sixteen years old, called by the defendants, testified that the child had been playing at a watering trough on the opposite side of the street from his home; that

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\* "It was a good sized yard and the gate was usually open."

† The plaintiff's grandmother described it as "the big meat wagon."



the witness told him to go away; that the child started to go across the street, and when he got "to about a foot from the wagon, the driver hollered and the child fell backwards in the street." Bly, also called by the defendants, testified that he was driving down the street "walking his horse, looking in the direction he was going; that he first saw the child when it came out into the street about six inches from the hub of his front wheel; that he hollered to the child and it fell over; that he did not strike the child or run over it." On cross-examination he said that he first saw the child when it "loomed right up" about six inches from the hub of the wheel; that this was the front wheel; that there were no other teams about there and no other persons except one Thornber and some boys. He further said that before he saw the child, which appeared on the east side of the team, he saw Thornber on the west side and spoke to him; that in thus speaking he turned his head around; that it was "fifty feet or more after he spoke to Mr. Thornber that he saw the child"; that he saw some boys standing at the watering trough which was upon the other side of the street; that he had passed the watering trough; that when he "hollered" the child fell, and that he "jumped right out and picked the child up; . . . it was a clear day; that he was looking straight ahead." There was evidence that when the child was picked up one of its toes was somewhat crushed. Thornber, also called by the defendants, testified that he was walking up the street at the time the child was hurt; that he knew Bly; that he (Bly) was driving his horse at a walk; that he saw the child on the ground after Bly "hollered"; that he saw the child fall, but could not tell whether any part of the wheel struck it. Upon cross-examination he said that before the child was hurt Bly spoke to him (the witness), "bid him the time of day and I spoke; after that when I was just a little behind the wagon I heard a scream, the child was on the ground a short distance from the team." He further testified that when he first saw the child it was "about the centre near the hub" of the further hind wheel from him, and that he "could not swear whether it was pushed by the hub or . . . was scared by the hollering" of Bly.

In view of the broad daylight, the wide, straight street, the evidence as to the presence of children, the absence of any other

teams and the evidence as to the movements of the child, the jury may have come to the conclusion that if Bly had exercised proper care he would have become aware of the presence of this child before it was close under the wheel, and that by reason of his conversation with Thornber, or for some other reason, he failed to see when he ought to have seen, and was therefore negligent. We cannot say as matter of law that the evidence did not warrant a finding for the plaintiff on this branch of the case.

3. As to whether at the time of the accident Bly was acting as the servant of the defendants. One West, called by the plaintiff, testified that he had known Bly for years and had done business with him; that for eight or ten years last past "Bly was driving teams, taking orders and working for Anthony, Swift and Company," and that during that time he (the witness) had not known him to work for any one else; "that the team Bly drove was marked Anthony, Swift and Company; . . . that the bills presented to witness for goods sold him were made out in the name of Anthony, Swift and Company; that on the place of business where Bly worked was the name in big letters, Anthony, Swift and Company." On cross-examination he testified that "he did not know who Anthony, Swift and Company were, only by the name; that he did not know who they were; that he was not positive whether it was Anthony, Swift and Company on the wagon or Swift and Company." There was further evidence that on the teams used in the business were the words "Anthony, Swift and Company," and that the blankets were marked in the same way. Indeed it was conceded in the defendants' brief that there was ample and uncontradicted evidence "that the party employing the driver [Bly] used the name of Anthony, Swift and Company," but the defendants contended and introduced evidence tending to show that this name was used by a Maine corporation called Swift and Company, "as a means of keeping the business of the different branches distinct, 'to separate the houses.'" It did not appear that the defendant Swift ever was in Fall River, nor that the defendant Anthony was at the place of business except "once in a while." The manager of the business testified that Anthony and Swift "were simply stockholders in the corpora-

tion." Neither of the defendants appeared, nor was there produced any charter of the alleged corporation, nor was there any evidence whatever of the proceedings for its incorporation, nor were any of its books shown. The evidence that the defendants were stockholders in the corporation justified the inference that in some way or other they were connected with the business, and, in the absence of evidence as to any other persons of the same name being thus connected, justified the further inference that the defendants were the persons respectively designated as Anthony and Swift in the name under which the business was done. Here, then, was presented a case where a business was carried on under an apparent firm name in which appeared the names of the defendants. The name used was such as ordinarily would designate a firm rather than a corporation. It was of vital importance to the defence to show that Bly's principal was not a firm but a corporation, and it must be assumed to have been in their power to prove by some plain and direct evidence documentary or otherwise, the existence of the corporation. In the state in which the case was left by the defendants, the jury were warranted in coming to the conclusion that the evidence, if presented, would not have been favorable to the defendants upon this point, and that in so far as the title under which the business was conducted indicated a partnership it was in accordance with truth.

4. The request that the evidence of the witness Pritchard as to who composed the firm of Anthony, Swift and Company should be stricken out was substantially complied with by the judge. There appears no error in the manner in which the judge dealt with the request of the defendants as to this.

The case was properly submitted to the jury.

*Exceptions overruled.*

## WILLARD M. PETTEY vs. SAMUEL BENOIT.

Bristol. October 22, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, &amp; RUGG, JJ.

*Practice, Civil*, Auditor's report. *Appeal. Evidence*, Book entries, Extrinsic affecting writings.

Where the rule to an auditor contains an agreement of the parties that the auditor's findings of fact shall be final, his rulings as to the admission of evidence are subject to review by the trial court upon a motion to recommit the report on account of alleged errors in such rulings, and if the motion is denied the party aggrieved may appeal to this court.

Entries made by a dealer in his books of account are not contracts but are private memoranda kept for his own use, and in an action for the price of goods sold and delivered he can show that goods charged on his books to another person were sold to the defendant.

In an action for the price of goods sold and delivered, where the plaintiff has introduced in evidence his books of account, assumed to have been books of original entry, wherein the goods alleged to have been sold to the defendant are charged to him up to a certain date and after that date are charged to his son, the plaintiff may be allowed to introduce evidence of a conversation with the defendant's son, in which the son asked the plaintiff to make out the bills to him instead of to his father but said that his father would be responsible for them, and to show that the goods although charged to the son were delivered according to the course of business to the defendant or to his order; and this conversation is admissible to explain why the charges were made as they were irrespective of the question whether the son had authority from his father to give the directions.

CONTRACT on an account annexed for goods sold and delivered. Writ in the Second District Court of Bristol dated April 27, 1905.

On appeal to the Superior Court the case was referred to L. Elmer Wood, Esquire, as auditor, in accordance with an agreement of the parties filed in court, in which it was stipulated "that his findings on the facts shall be final and that he shall hear the parties and make his report to the court on or before Dec. 21st, 1905."

The rule to the auditor was as follows:

"It appearing to the court that the trial of the above entitled cause will require an investigation of accounts, or an examination of vouchers by the jury, the court appoint as auditor L. E. Wood, Esq., to hear the parties, examine their vouchers and

evidence, state the accounts, and make report thereof to the court.

"Findings upon facts to be final and report to be filed on or before December 21st, 1905."

The auditor filed a report, in which he found the following facts:

The plaintiff was a dealer in mason's supplies, and the defendant, Samuel Benoit, was a mason and contractor. The action was for the price of supplies which the plaintiff alleged that he sold and delivered to the defendant, the items beginning on April 2, 1904. Before that time the defendant had asked the plaintiff to sell him supplies on credit, and the plaintiff had agreed to do so to a limited extent. In March, 1904, the defendant ordered supplies, which later were paid for, the money being delivered to the plaintiff by the defendant's son A. F. Benoit. These supplies were ordered at different times, sometimes by the defendant's teamsters, sometimes by his son, and in one or two instances during that month or later by himself, and they were put aboard the defendant's teams at the plaintiff's premises. Practically the same course was followed with reference to the items sued on. The plaintiff furnished all the supplies itemized in his account, and the prices charged were the fair market value of the goods.

The question in the case was whether the supplies so furnished were furnished to the defendant or to his son, A. F. Benoit. The latter was doing business on his own account in the autumn of 1903 and the spring of 1904. The goods furnished in April and included in the first thirteen items in the account were ordered and delivered in the same way as those furnished in March. The original entries of sales were made by the plaintiff or his clerks on slips of paper and from them were copied at the end of the month into a sales book, and the totals were carried to a ledger account. All the original charges up to April 26 were made against the defendant. The plaintiff testified that on that date the defendant's son stated to him that his father was in trouble financially and did not want to mix the plaintiff's account up with it, and asked him to send the bills in his name, A. F. Benoit, but said that his father would be responsible for them. The auditor found that A. F.

Benoit did make the statement to the plaintiff. From that time charges in the sales book and ledger were made under the name of A. F. Benoit, and bills were sent out by the plaintiff in that name. The original charge slips still were made against the defendant excepting certain items made by the plaintiff's book-keeper, which were charged to A. F. Benoit. The defendant objected and excepted to the admission in evidence of A. F. Benoit's statement to the plaintiff.

In April the defendant went into bankruptcy. His teams previously had been transferred to his son, and business was carried on by his son. The auditor found, however, that the plaintiff furnished all the goods charged, with the exception of certain items on which no evidence was introduced, to the defendant, in the same way after his bankruptcy as he had before, excepting that the charges were made and bills sent to A. F. Benoit as stated; that the plaintiff sold the goods on the credit of the defendant and that the defendant did nothing to stop the plaintiff from continuing his dealings with him.

The auditor found for the plaintiff in the sum of \$152.78, with interest from July 1, 1904, to the date of the writ.

The defendant moved to recommit the report to the auditor for further hearing and a supplemental report or for amendment, for the reasons that the auditor admitted the testimony of the plaintiff as to certain declarations made by A. F. Benoit affecting the question of the defendant's liability, to the admission of which testimony the defendant objected and excepted, that this testimony was hearsay only and the declarations were admissible only on the question of the defendant's liability, that no facts were shown in the report from which it could be found as a matter of law that A. F. Benoit was the agent of the defendant at the time the declarations were made or that A. F. Benoit had any authority to make such declarations to affect the defendant, and that there was no finding of fact that A. F. Benoit was such agent or other finding which showed any legal grounds why the declarations were admitted.

In the Superior Court *Holmes, J.* denied the motion, and made an entry that this was done as a matter of discretion. There was a hearing on the auditor's report and judgment was ordered for the plaintiff in the sum of \$276.95. The defendant appealed.

*A. N. Lincoln & A. H. Hood*, for the defendant.

*S. W. Ashton*, for the plaintiff.

BRALEY, J. Where the rule, as in the present case, contains an agreement of the parties that the auditor's findings of fact shall be final, he becomes in effect a referee, and if his rulings on the admission of evidence were not reviewable in some form great injustice might be done. A proper motion to recommit for such errors presents the question in the first instance to the trial court, and if denied the party aggrieved may have the order reviewed by this court. *Tripp v. Macomber*, 187 Mass. 109. *Allwright v. Skillings*, 188 Mass. 538.

It appears from the report that at the hearing before the auditor not only the liability of the defendant, but the delivery of the goods was in issue. The sales were made by the plaintiff, or his clerks, and a memorandum of each sale was kept on slips of paper from which at the end of the month they were entered by them in a sales book, and then carried to the ledger. Up to a certain date these entries were in the name of the defendant, but goods sold after that time were charged on the books to his son, although no changes were made on the original slips from which the items were taken. From the language of the report it is to be assumed that the plaintiff, and the clerks who made the entries on the slips, testified in support of the charges appearing in the sales books, which thus became admissible as books of original entry to prove delivery. *Kent v. Garvin*, 1 Gray, 148. *Gould v. Hartley*, 187 Mass. 561. *Field v. Thompson*, 119 Mass. 151. *Kaiser v. Alexander*, 144 Mass. 71, 78. Such entries are in the nature of private memoranda kept by the plaintiff, and not being conclusive it was open to him to explain that notwithstanding the form in which they appeared, the goods though charged to the son were delivered according to the course of business between them either to the defendant, or to his order. *James v. Spaulding*, 4 Gray, 451. *Commonwealth v. Jeffries*, 7 Allen, 548, 564. *Allen v. Fuller*, 118 Mass. 402. The plaintiff's evidence of his conversation with the son, who requested that the bills for goods thereafter should be sent in his name instead of his father's, because of the latter's request and financial condition, was competent in explanation of the subsequent account. *Langdon v. Hughes*, 107 Mass. 272, 274. *Holmes v.*

*Hunt*, 122 Mass. 505. As the evidence was admissible for this purpose it becomes immaterial to inquire whether the son was the defendant's agent by whose directions he would be bound, and the motion to recommit was properly denied.

*Judgment affirmed.*

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WILLIAM H. HODDE, JR. vs. ATTLEBORO MANUFACTURING COMPANY.

Bristol. October 22, 23, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence, Employer's liability. Evidence, Remoteness.*

In an action by a boy employed by a manufacturer of jewelry against his employer for personal injuries, there was evidence that the plaintiff was about nineteen years of age and was not of average intelligence, that he was sent by one H. in the employ of the defendant to fetch some liquid called "dip" from a large crock standing in the yard of the factory, that the liquid was composed of oil of vitriol, nitric acid and muriatic acid, that it was heavier than water and made slippery everything dipped into it, that the plaintiff did not know what the mixture was composed of or contained and was not instructed by any one as to its dangerous character or told to look out for it, that he was given a pitcher which would hold about half a gallon and also a little pitcher from which the handle had been broken off, and was told to "take this pitcher and go down and get dip; and take that little pitcher beside it and put it in this pitcher," that he went down and set the larger pitcher on the ground beside the crock and took up the little pitcher and dipped it in the crock until it was pretty nearly full, that as he was "bringing it up" it was heavy and slipped out of his hand, and the liquid splashed into his face and eyes causing the injuries sued for, that it had become a part of the plaintiff's duty to do errands, that the foreman in the department, where the plaintiff worked as a scratcher of silver and on a foot press, had told the plaintiff to do as H. wanted him to and on two occasions before the accident had directed H. to ask the plaintiff to go or himself had sent the plaintiff with H. when H. went to the yard for dip, but that the plaintiff on these occasions had had nothing to do with bailing out the dip and that H. did not tell him about it or give him any instructions. *Held*, that there was evidence that the plaintiff did not assume the risk of the accident, evidence of due care on the part of the plaintiff, and evidence of negligence on the part of the defendant in failing to instruct the plaintiff properly and in providing him with a pitcher without a handle to dip the mixture from the crock; also, that there was evidence that the plaintiff at the time of the accident was acting within the scope of his employment.



In an action by a boy employed by a manufacturer of jewelry against his employer for personal injuries alleged to have been caused by a dangerous acid splashing in the plaintiff's face and eyes when he was sent without proper instructions and with unsuitable appliances to fetch some of it in a pitcher from a large jar standing in the yard of the factory, the defendant contended that the accident was caused by the plaintiff tipping the large jar a little and then slipping, and dropping the jar so that the acid splashed in his face. The defendant put in evidence the deposition of the person in its employ who sent the plaintiff for the acid and who testified that it was about ten or fifteen minutes after the plaintiff was injured when he saw the jars containing acid and those used in transporting it. The following questions and answers in the deposition, on objection by the plaintiff, were excluded by the judge: "What was the location and condition of the jars referred to when you first saw them after the plaintiff was injured? The jar had been moved about two or three inches. Was there any acid after the accident in the pitcher that the plaintiff carried down with him before the accident? There was not." A witness for the defendant, who testified that he saw the jars about twenty minutes or half an hour after the accident, said on his cross-examination that for all he knew a dozen or more persons might have gone into the yard from the time the plaintiff was injured up to the time he saw the jars. The defendant made no offer to show that the condition of things had not changed between the happening of the accident and the time referred to in the questions and answers excluded. *Held*, that, although the interval was short, this court could not say that the likelihood that other persons might have gone to the jar for acid was so slight that the exclusion of the evidence was a wrongful exercise of the discretion of the presiding judge.

MORTON, J. The plaintiff was injured while in the defendant's employment by the splashing up into his face and eyes of a mixture composed of oil of vitriol, nitric acid, and muriatic acid from a large crock standing in the yard of the defendant's establishment\* from which he had been sent to fetch some, and this is an action to recover for the injuries so sustained. The jury found for the plaintiff and the case is here on the defendant's exceptions.

The defendant contends that the plaintiff was not in the exercise of due care, that he assumed the risk, that he was not acting within the scope of his employment and that the judge erred in excluding certain evidence.

Whether the plaintiff was in the exercise of due care and assumed the risk depends on what knowledge and experience he had of the dangerous character of the mixture. He testified in substance that he did not know what the mixture was composed of or contained, and was not instructed by any one as to its dan-

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\* The defendant was a corporation engaged in the manufacture of jewelry.

gerous character or told "to look out for it." He was the only witness to the accident and his statement as to how it occurred was that he was sent down by one Hall after "dip," as the mixture was called, and was told to "take this pitcher and go down and get dip; and take that little pitcher beside it and put it in this pitcher"; that he took the pitcher, which he should judge would hold half a gallon, and went down and set it on the ground and took up the little pitcher and dipped it into the "big crock" and "got it pretty near full. As I was bringing it up, it was kind of heavy, it slipped out of my hand and went down and splashed up in my face and eyes." There was testimony tending to show that the mixture was heavier than water, and rendered anything dipped into it slippery, and that the little pitcher, which was the only thing furnished to dip with, had no handle. The plaintiff had been down once or twice with Hall, but, as he testified, "had nothing to do with bailing out the dip," and "he did not tell me anything about it or give me any instructions." The plaintiff was nineteen years old or thereabouts but there was testimony tending to show that he was not of average intelligence. We do not see how upon this evidence it could have been ruled as matter of law that the plaintiff was not in the exercise of due care, or that he assumed the risk. There was much contradictory evidence from the cross-examination of the plaintiff and other sources tending to impeach the plaintiff's credibility, but it was for the jury to say what the facts were and where the truth lay. If the jury believed the plaintiff there was not only evidence of due care on his part and non-assumption of the risk, but of negligence on the part of the defendant in failing to properly instruct him and in providing a pitcher with a broken handle to dip the mixture from the crock.

The ground on which the defendant contends that the plaintiff was acting outside of the scope of his employment is that he was employed as a scratcher on silver and afterwards set to work on a foot press and that getting acid was not a part of his duty at either of those jobs. But there was testimony tending to show that it became a part of his work to do errands during the last two weeks, that the foreman of the department where he worked told him to do as Hall wanted him to and had directed Hall to

ask him to go or had himself sent him down with Hall on two occasions before the accident. If believed this evidence plainly warranted a finding that the plaintiff was acting within the scope of his employment at the time of the accident.

The remaining exception is to the exclusion of the answer to the 36th and 39th interrogatories in the deposition of Hall who sent the plaintiff down to get the acid. The interrogatories were as follows: "Int. 36. What was the location and condition of the jars referred to in the last interrogatory, namely, when you first saw them after William H. Hodde was injured?" "Int. 39. Was there any acid after the accident in the pitcher said Hodde carried down with him before the accident?" The answer to the first interrogatory was "The jar had been moved about two or three inches," and to the second "There was not." The defendant's theory as to the way in which the accident happened was that "the plaintiff bent over and tipped the large jar a little, and then slipped and dropped the jar, whereupon the acid splashed up into his face" and its contention is that the evidence that was excluded tended to support this theory. It may well be doubted whether if the evidence had been admitted it would have affected the result, and therefore whether the defendant was harmed by its exclusion. But the evidence was unaccompanied by any offer to show that the condition of things had not changed between the happening of the accident and the time to which the observation of the witness related. And though the interval was short,\* we cannot say that the likelihood that other persons might have gone to the crock for acid was so slight that the presiding judge was not warranted in the exercise of his discretion in excluding the evidence. *Powers v. Boston & Maine Railroad*, 175 Mass. 466. One witness, called by the defendant, who had testified on direct examination that he "saw the jars in the yard, in about twenty minutes or half an hour after the accident," said in the course of the cross-examination that he did not know "how many persons may have gone into the yard from the time when the plaintiff was injured up to the time I went out for the acid, there may have been a dozen or more for all

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\* Hall testified that he should say it was about ten or fifteen minutes after the plaintiff was injured when he saw the jars containing acid and those used in transporting it.

I know," from which it might be inferred that persons very frequently went to the crock for acid and might have moved it.

We have considered only the exceptions which have been argued treating the others as waived.

The result is that the exceptions must be overruled.

*So ordered.*

*S. R. Spring*, for the defendant.

*J. J. Feeley*, (*R. Clapp* with him,) for the plaintiff.

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GEORGE McGUINNESS vs. DANIEL F. LEHAN & another.

Bristol. October 28, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence, Employer's liability.*

In an action by a boy eighteen years of age employed in a laundry against his employer, for personal injuries from being hit by a piece of the rim of the revolving basket of an extractor which broke immediately after the plaintiff had started the machine, it appeared that the plaintiff had been working on the machine for nineteen days when the accident occurred, that he started the machine in the way in which he had been instructed to start it, and followed his instructions in other matters except possibly in the matter of packing the basket. The evidence of the plaintiff tended to show that the basket was packed properly while that of the defendant tended to show that it was overloaded and that this was the cause of the accident. *Held*, that the question whether the plaintiff was in the exercise of due care in packing the basket as he did and in failing to discover a defect in the machine, if it existed, was for the jury.

In an action by a boy eighteen years of age employed in a laundry against his employer, for personal injuries from being hit by a piece of the rim of the revolving basket of an extractor which broke immediately after the plaintiff had started the machine, it appeared that the extractor had an outer shell of cast iron, within which and of the same shape, with a space of three and a quarter inches between, was the revolving basket into which clothes were put to be dried, that it was expected that when the power was applied and the basket began to revolve it would vibrate more or less but that after a few revolutions it would cease to vibrate and revolve steadily, and that it was not expected or intended that the basket would "bang" against the shell. There was evidence tending to show that the basket had "banged" against the shell before the accident causing the rim to strike the shell and break, that this "banging" was due to the machine being out of order, and that the defendant knew of it or might by the exercise of reasonable care have known of it, that after the accident the basket was lying against the shell and that this ought not to have happened if the machine had been in order, also that the machine had been

repaired before the accident and that in making the repairs one of the discs, which formed a part of the conical bearing for the vertical shaft on which the basket rested, had been left out. *Held*, that there was evidence for the jury of negligence on the part of the defendant.

TORT for injuries received while in the employ of the defendants. Writ dated October 20, 1903.

At the trial in the Superior Court before *Crosby, J.* the following facts appeared :

The plaintiff, then about eighteen years old, was employed in a hotel kept by the defendants. He originally was employed by the defendants as house man, doing chores about the hotel, and had worked in that capacity for either two or three months, until June 1, 1903, when he was put at work in the laundry connected with the hotel and operated by the defendants. He continued working in the laundry until the time of the accident on June 19, 1903, when he was working on what is known as an extractor \* or washing machine, and had just started it when the rim around the top of the basket broke and one of the pieces that flew off struck him.

This extractor consists of two principal parts, a shell to catch the water which flies from the material which is being dried, and a basket to contain the material. The shell is stationary. It resembles a kettle set on two legs, with no top or bottom. It is twenty-seven inches in diameter at the middle, the largest part, the sides curving, so that the diameters of the openings at the top and bottom are less than at the middle. One of the legs of the kettle is hollow, thus forming a pipe to carry off the water. As the water flies from the basket it collects on the sides of the shell and flows away through the hollow leg. The shell is made of cast iron.

Within the shell is the basket, of practically the same shape as the shell, but twenty inches in diameter in the largest part so that its outside wall is everywhere about three and one quarter inches distant from the inside wall of the shell. Around the circumference of the opening of the basket is a metallic band composed of copper and other materials which projects about one

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\* The machine appears to have been similar to the one partially described in *Merrimac Chemical Co. v. American Tool & Machine Co.* 192 Mass. 206.

half of an inch above the top of the basket, making a rim for it. It was this band which flew in pieces, injuring the plaintiff. The basket is perforated up to a point about two inches below the rim. On the outside of the basket there are three hoops or bands like the hoops of a barrel. The basket rests on a vertical shaft about one and one sixteenth inches in diameter and the shaft rests in a socket in the foundation of the machine. The socket is about six inches long and consists of two parts, an outer chamber and an inner chamber or bushing. Between the outer chamber and the bushing are rubber washers. The shaft sets in the bushing in such a way as to make it a good running fit. In the bottom of the bushing is a disc or washer, the top side of which is hardened and made conical. The bottom of the shaft is hardened and rests upon the cone of this washer. Upon the shaft is a pulley which takes power by a belt from the fast pulley on the driving shaft and thus causes the shaft to turn and with it the basket, which is fastened to its top, the only support of the shaft being the hardened conical bearing and the walls of the bushing.

When the power is applied, the theoretical speed of the shaft and the basket is thirteen hundred and forty revolutions a minute. This, however, is reduced by the slip of the belt to twelve hundred and fifty revolutions a minute. The material to be dried having been put in the basket, the rapid revolutions of the basket and its contents cause the water to fly through the perforations in the basket, thus extracting the water from the material.

The plaintiff testified that it was a part of his duty to work on the extractor; that just before the accident he had put clothes in the extractor and started it by means of the lever used to shift the belt from the loose to the tight pulley; that about a minute after that he was hit; that he heard no noise before he was hit; that he had received instructions just how to wash the clothes from one McGuire, who told him to put the clothes into the washer, turn on the power and start the machine; that he showed him how to start it and turn it off; that nothing was said to him about the operating of the machine other than that; that no one told him to be careful of any part of the machine; and that he never had seen an extractor before.

On cross-examination he testified that he had been working on that machine nineteen days, and had used it about nine times a day; that the last time he had used the machine previous to his injury was the day before at about half past three; and that he then noticed nothing unusual about it.

The evidence in regard to the cause of the accident is described in the opinion.

The defendants asked the judge to rule that there was no evidence of the defendants' negligence, that there was no evidence of the plaintiff's due care, and that the plaintiff could not recover. The judge ruled that there was not sufficient evidence of the defendants' negligence, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

*J. W. Cummings, (C. R. Cummings & R. P. Coughlin with him,)* for the plaintiff.

*R. P. Borden,* for the defendants.

MORTON, J. This is an action of tort to recover for personal injuries sustained by the plaintiff while at work upon a washing machine in the laundry connected with a hotel kept by the defendants. At the close of the evidence the judge ruled that there was no sufficient evidence of the defendants' negligence and ordered a verdict for the defendants. The case is here on exceptions by the plaintiff to this ruling and direction. The questions presented are the usual ones of the plaintiff's due care and the defendants' negligence.

The accident was caused by the breaking of the rim on a part of the machine called the basket. The plaintiff, who was about eighteen years old and had been working on the machine nineteen days when the accident occurred, testified that he started the machine by means of the lever used to shift the belt from the loose pulley to the tight pulley and about a minute after was hit by a piece of the rim which broke. He also testified that he had been instructed by one McGuire, who worked on the machine before he did, how to start and stop the machine and how to wash the clothes. There was nothing to show that these instructions were not sufficient or that they were not followed by the plaintiff except possibly in the matter of packing or loading the basket. As to that, testimony introduced by the plaintiff tended to show that it was properly packed or loaded, and testi-

mony introduced by the defendants tended to show that it was overloaded and that the accident was caused thereby. Clearly the question was one for the jury as was also the question whether the plaintiff was or was not negligent in failing to discover the defect, if there was one, in the rim of the machine. We are of opinion that there was evidence for the jury on the question of the plaintiff's due care.

As to the defendants' negligence, there was, we think, evidence from which the jury could have found that the accident was caused by the machine's being out of order and that the defendants knew or in the exercise of due care should have known that it was out of order. The machine consisted of an outer shell within which was a basket into which the clothes that were being washed were put. The basket was fixed to a vertical shaft which was set in a bushing on a conical bearing and so adjusted that when power was applied the basket with its load would after a few revolutions and vibrations find its centre of gravity like a spinning top. There was testimony tending to show that, though it was expected that when the machine was started the basket would vibrate more or less, it was not expected or intended that it would "bang," as the witness described it, against the shell. There was also testimony tending to show that the basket had "banged" against the shell before the accident, which, as the jury could have found, caused the rim to strike the shell and break. And the jury could also have found that this "banging" was due to the machine's being out of order and that the defendants knew of it or in the exercise of reasonable care should have known of it. One witness testified that after the accident the basket was lying against the shell which another witness testified ought not to have happened if the machine had been in order. Another witness testified that the machine had been repaired before the accident, and that one of the discs which formed a part of the conical bearing for the shaft had been left out. It was for the jury to say what effect, if any, this had on the running of the machine. The defendant Lehan testified that the basket had "banged" against the shell before the accident, and that the rim had struck the shell, showing that he knew of the "banging," and it was for the jury to give such weight as they deemed proper to his explanations, and to de-



cide whether the "banging" was or was not due to the machine's being out of order.

We are of opinion that there was evidence for the jury on the question of the defendants' negligence.

*Exceptions sustained.*

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GEORGE A. GREER vs. UNION STREET RAILWAY COMPANY.

Bristol. October 23, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Evidence, Relevancy and materiality. Witness, Cross-examination.*

In an action against a street railway company for personal injuries from the alleged negligent starting of an open electric car of the defendant as the plaintiff was attempting to board it, the jury returned a verdict for the defendant, and the plaintiff excepted to the exclusion of the question asked the defendant's conductor on cross-examination "If it was not a common occurrence for the cars to be slowed down for the purpose of allowing intending passengers to board the cars while the cars were moving at a slow rate of speed, and if that was not customary?" It appeared from the uncontradicted testimony at the trial that the car came to a full stop for the purpose of discharging and receiving passengers before the plaintiff attempted to get on it. The plaintiff did not testify that he knew of any such custom as that referred to in the question, or that he supposed the car to be in motion or found it to be moving when he stepped upon it. *Held*, that proof of a custom not to stop cars on other occasions had no bearing on the question whether this car started suddenly after being stopped, and would not have shown an implied invitation to board the car while in motion because no such invitation ever reached the plaintiff or was acted upon by him, and therefore that the evidence excluded was irrelevant and immaterial.

The extent to which cross-examination upon collateral issues shall be allowed for the purpose of testing a witness's honesty, credibility or accuracy of recollection must be determined largely by the trial judge in the exercise of his discretion.

RUGG, J. This is an action of tort for personal injuries suffered by the plaintiff while in the act of boarding the defendant's car. The case, as set out in both counts of the declaration, alleged a negligent starting of the car by the defendant. The plaintiff's testimony was that the defendant's car, which was an old fashioned open electric car, had stopped on Purchase Street in the city of New Bedford south of a cross walk on the southerly side of William Street, and that he was in the act of boarding the

car for the purpose of being transported as a passenger and had one foot on the running board and one hand upon the stanchion when the car, which had been previously stopped, suddenly started, and that he heard no bell given to start the car. There was other testimony that the car stopped at this point for the purpose of taking on and letting off passengers. The motorman testified that he stood upon the front platform of the car looking forward and attending to his duties, that he got the bell to start the car, started up and came to a stop on the further side of William Street, and that he did not see the plaintiff and knew nothing of the accident until after he had fallen. The conductor testified that the car stopped, as stated by the plaintiff, to take on passengers; that he looked in the direction from which the plaintiff came, saw no persons approaching the car or making any signal, looked in the opposite direction to see if passengers were coming from the opposite side of the street, and seeing no person approaching, gave the bell to start the car, and although standing upon the rear platform upon the opposite side from that on which the plaintiff sought to board the car, he saw nothing of the plaintiff until he had fallen. This testimony was uncontradicted. There was no testimony that the plaintiff made any signal to either the conductor or motorman before attempting to board the car, or saw them or had any information as to whether they saw him. The defendant introduced testimony tending to show that the car was moving when the plaintiff sought to board it. There was other evidence from which the jury could infer due care on the part of the plaintiff and negligence on the part of the defendant. In this state of the evidence, the plaintiff, in cross-examination of the defendant's conductor, asked, — "If it was not a common occurrence for the cars to be slowed down for the purpose of allowing intending passengers to board the cars while the cars were moving at a slow rate of speed, and if that was not customary." Upon objection by the defendant, this question was excluded. The jury returned a verdict for the defendant, and the plaintiff's exception to the exclusion of the question presents the only point raised by the exceptions.

From the foregoing statement of the testimony, it appears to have been uncontradicted that the car came to a full stop for the

purpose of discharging and receiving passengers. This being so, proof of a custom of the defendant not to stop on other occasions had no bearing upon the issue raised, which was whether or not the car started suddenly at the particular time under inquiry. It is contended by the plaintiff that proof of such a custom would have shown an implied invitation to him to board the car while in motion. But the plaintiff did not say that he knew of any such custom, nor according to his own testimony did he suppose that the car was in motion or find it to be moving when he stepped upon it. There can be no invitation when upon undisputed evidence no call, articulate or inarticulate, is communicated to anybody and when no one is allured into action or lulled into quiet. At best, the alleged invitation never reached the plaintiff and never was acted upon by him.

The evidence which might have been elicited by this question had no tendency to contradict any testimony given by the witness in his direct examination or in his cross-examination before this question was put, nor to show that he had made inconsistent statements on other occasions. The discretion of a trial judge must in large measure determine the extent to which cross-examination upon wholly collateral issues may be permitted for testing a witness's honesty, credibility or accuracy of recollection. *Robinson v. Old Colony Street Railway*, 189 Mass. 594. Such discretion was wisely exercised in the present case by refusing to permit the question to be put.

*Exceptions overruled.*

*M. R. Hitch*, for the plaintiff.

*C. W. Clifford & H. S. Knowles*, for the defendant, were not called upon.

MARY A. MEADOWCROFT vs. NEW YORK, NEW HAVEN,  
AND HARTFORD RAILROAD COMPANY.

Bristol. October 23, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence, Employer's liability. Railroad.*

In an action against a railroad company by the widow of a train checker who was employed in a freight yard of the defendant for causing the death of the plaintiff's husband, who was killed instantly by three cars that were kicked down upon the track where he was at work, it could be found that the plaintiff's husband after dark in the performance of his duty was standing with a lantern on his arm on the middle track at a crossing, taking down with a pad and pencil the numbers of the cars on a train that was moving slowly past him, when the cars that struck and killed him came upon him without any warning or light and without any brakeman upon them. There was evidence tending to show that when cars were kicked down on a track in the yard it was customary to have a brakeman upon them, with a lantern if it was at night, to warn the checkers who were taking the numbers, and that such warnings usually were given. There also was evidence tending to show that cars sometimes were kicked down without any brakeman or light upon them, some witnesses testifying that this happened several times a day or night and others testifying that it did not occur very often, but it could have been found that if this was done it was contrary to the rules and that the person doing it was liable to a reprimand. *Held*, that the case properly was submitted to the jury, who were warranted in finding that the plaintiff's husband was in the exercise of due care and that his death was due to negligence on the part of the conductor in charge of the three cars in sending them down without a brakeman or a light upon them to warn the checkers.

MORTON, J. This is an action of tort by the plaintiff as the widow of one William E. Meadowcroft who was instantly killed while at work in the defendant's yard at Fall River, to recover damages under the employers' liability act for the death of her husband. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the judge to rule that the deceased was not in the exercise of due care, and to direct a verdict for the defendant.

We think that the ruling was right. The deceased was a car checker, whose duty it was to take the numbers of the cars on freight trains. The accident happened after dark on November 23, 1904. The deceased, with a lantern on his arm and a pad and

pencil, was on the middle track at the Water Street crossing taking the numbers of cars on a train that was moving slowly toward the wharf, when, without any warning or light, and without any brakeman being upon them, three cars were kicked down on the track where the deceased was, and struck and killed him. We state the facts as the jury would have been warranted in finding them. There was testimony tending to show that, when cars were kicked down on a track in the yard, it was customary to have a brakeman upon them, with a lantern if it was night, so as to warn the checkers who were taking the numbers, and that such warning was usually given. There was also testimony tending to show that cars were sometimes kicked down without any brakeman or light upon them; some witnesses testifying that this happened several times a day or night, and others testifying that it did not occur very often. The jury could have found, however, that, if this was done, it was contrary to the rules, and that the person doing it was liable to a reprimand.

A railroad yard with numerous tracks, and with engines and trains and cars passing back and forth and from one track to another, is a place of danger, and the deceased must be held to have assumed the risks incident to his employment in such a place. But if it was customary to give warning of the approach of cars that were kicked down on a track where he or other checkers were at work, he had a right to rely upon such custom and to govern himself accordingly; and it was for the jury to say to what extent cars were kicked down without such warning and how far, if at all, such conduct affected the custom and the right of the deceased to rely upon it. Upon the evidence before them we think that the jury properly could find, as they must have found, that the deceased was in the exercise of due care, and that the accident was due to negligence on the part of the conductor in sending down the cars without a brakeman or light upon them to warn the checkers. *Maguire v. Fitchburg Railroad*, 146 Mass. 379. *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 582. *Maher v. Boston & Albany Railroad*, 158 Mass. 36. *Steffe v. Old Colony Railroad*, 156 Mass. 262. *Carroll v. New York, New Haven, & Hartford Railroad*, 182 Mass. 287. In the case of *Vecchioni v. New York Central &*

*Hudson River Railroad*, 191 Mass. 9, relied on with others by the defendant, the deceased had no right to rely upon any warning. The exceptions taken by the defendant in regard to matters of evidence have not been argued and we treat them as waived.

*Exceptions overruled.*

*F. S. Hall & C. C. Hagerty*, for the defendant.

*J. W. Cummings & C. R. Cummings*, for the plaintiff.

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BRIDGET CAMPBELL & another vs. CHARLES C. COOK.

Bristol. October 23, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Equity Jurisdiction, Accounting, Discovery. Trust. Agency. Equity Pleading and Practice, Appeal.*

Where the owners of improved real estate appoint an agent to manage the property under an irrevocable power for a term of years, accounting to them for the rents after retaining in his discretion such sums as may be required for the disbursements enumerated in the instrument of appointment, a fiduciary relation is created which entitles the owners of the real estate to an accounting in equity. In a suit in equity by the owners of improved real estate against an agent appointed by them to manage the property under an irrevocable power for a term of years, accounting to them for the rents after retaining in his discretion such sums as might be required for the disbursements enumerated in the instrument of appointment, for an accounting, and seeking discovery as to the amount of insurance procured and placed by the defendant on each parcel of real estate, giving the rates paid and the names of the companies which issued the policies, the judge found that the insurance companies were solvent and declined to order the defendant to disclose their names or to give further information concerning the insurance. *Held*, that the plaintiffs were entitled to a full discovery to ascertain whether the disbursements charged by the defendant actually had been made, including the names of the companies and the premiums paid for insurance to companies of which the defendant was the local agent in which it appeared that so far as possible he had placed the insurance. *Held, also*, that the judge's finding of financial soundness did not involve a finding that the defendant was not obliged to account further by stating the names of the companies, and that the refusal to order a disclosure of the names was a ruling of law, which on appeal could be reversed.

BILL IN EQUITY, filed February 3, 1906, by Bridget Campbell and Sarah Campbell Lima, the owners in common, with one

Margaret A. O'Connor, of certain parcels of improved real estate in the city of Fall River composing the John Campbell estate, alleging that on April 10, 1905, the plaintiffs and O'Connor appointed the defendant their agent and attorney to manage and control the property in question for the term of five years, for a compensation of \$25 per month, that the defendant agreed to act as agent in the management of the property for the term of five years, to act faithfully in the agency and to render an account to each of the owners separately in each and every month, that the defendant rendered an account each month to each of the owners, but an incomplete one, that on January 23, 1906, and on divers other days, the plaintiffs requested the defendant to render a more complete account and to exhibit to the plaintiffs or their attorney the items contained in certain bills enumerated which were charged against the estate and paid with money out of the estate, that the plaintiffs requested further that the defendant should state what insurance he had procured for the estate during his agency, from whom he procured such insurance, how much of such insurance of every kind and description was carried by each piece of property in the estate and at what rate, and that the defendant refused to comply with either of these requests; praying that the defendant be compelled to render an account to the plaintiffs, 1, of the items contained in the bills enumerated, 2, of the amounts of insurance carried by each parcel of the properties of the John Campbell estate, the rate paid for such insurance and the names of the companies in which such insurance is carried, whether it be fire or any other kind of insurance, 3, for a subpoena, and 4, for further relief.

The power of attorney and agreement referred to in the bill was as follows :

"This agreement made this tenth day of April, 1905, by and between Bridget Campbell, Sarah Campbell Lima, and Margaret A. O'Connor, all of Fall River, County of Bristol, State of Massachusetts, widow and children of John Campbell, late of said Fall River, deceased, parties of the first part, and Charles C. Cook of said Fall River, party of the second part,

"Witnesseth, that in consideration of the signing of these

presents by the respective parties, said parties of the first part hereby jointly and severally covenant and agree with the said party of the second part and also severally covenant and agree with each other as follows:

"1. That they will constitute and appoint, and they do hereby constitute the said Charles C. Cook to be the true and lawful attorney irrevocable of them and each of them for the term of five years from this date, to manage and control, as their agent and attorney and in their names and for their use and benefit, all the real estate belonging to them jointly situated in Fall River and devised to them under and by the will of the said John Campbell, deceased, together with all buildings thereon, with full power to let and rent, and with the approval of a majority of them, to lease for a term not exceeding five years said real estate or any portion thereof or any buildings, stores or tenements thereon, and to collect all moneys due to them or each of them from tenants of said real estate whether as rent or for use and occupation of any part thereof, or of any building, tenement, or store thereon, and to give in our names receipt and acquittance therefor; also to make, and out of the moneys so received to pay for, all proper repairs upon and about said property, and to keep the buildings insured in our name against fire, explosion and casualties, and to pay for the same out of the said receipts; also out of said moneys so received, to pay all taxes, water rates and assessments levied or assessed upon said property, and to pay the interest upon all mortgages on said property and such instalments of the principal of said mortgages as may be from time to time required by the mortgagees; also to account to each of us monthly under this power of attorney and to pay to each one of us one-third of the moneys so received, after deducting and holding sufficient thereof to meet the disbursements hereinbefore provided for, together with such further sum as may be agreed upon in writing between them or a majority of them and said attorney as compensation for his services hereunder.

"And for the consideration aforesaid the Charles C. Cook, party of the second part, hereby covenants and agrees with the parties of the first part, to act as said agent and attorney in the management and control of said property as aforesaid for and during said term of five years for such sum as compensation



for his services as shall be agreed upon in writing by and between him and the parties of the first part, or a majority of them.

"And the parties of the first part hereby grant and confirm unto said attorney full power and authority in their names to begin and defend legal proceedings for the purpose of collecting said moneys, terminating tenancies, ejecting tenants from the property, and defending and preserving their rights and interests therein, and generally to do and perform any act or thing in and concerning the premises aforesaid as fully and effectually as they or either of them might do if personally present.

"In witness whereof we hereto set our hands and seals this tenth day of April, 1905.

Her

"Bridget x Campbell

Mark

Sarah Campbell Lima.

Margaret A. O'Connor.

Charles C. Cook."

Here followed the signature of a witness.

The following is a copy of the contents of a letter sent by the counsel for the defendant to the counsel for the plaintiffs:

"Mr. Cook declines to accede to the request contained in your letter to me of Jan. 23, 1906, for the reason that he has not only submitted for the inspection of yourself and Mr. Coughlin his books, his checks, and the original receipted bills, but has also submitted to your clients every month a statement giving the names of every party paid and the date and amount of every payment. If upon inquiry of any of the persons named or any other person who knows anything about the work done or materials furnished there appears to you to be anything wrong in regard to any bill, I will submit the matter to Mr. Cook for explanation; if he does not satisfactorily explain it you will of course be at liberty to take any action that you think best for the interests of your client.

"As to the insurance Mr. Cook says that he has already submitted to you the gross amount of insurance carried on the property and the premiums paid; but he is willing, if you care to do so, to allow one of the leading insurance agents of the city, —

L. N. Slade, W. B. M. Chace, Geo. N. Durfee or Chester W. Green, to examine at your expense the insurance that he is carrying on each building, and the rates he is paying therefor; provided such examiner is to certify to you and to him whether or not the amount carried on each building is for a proper amount, and at the regular rate established by the insurance companies of Fall River, but not to disclose the names of the companies with which the insurance is made as Mr. Cook considers that his own private affair."

A judge of the Superior Court made the following decree :

"This case came on to be heard at the June sitting of the Superior Court in New Bedford in 1906. The court heard the evidence of the parties which was both oral and written. The case was argued by counsel. It appeared to the court from the whole evidence that the plaintiffs prior to bringing the suit had ample opportunity to examine all the itemized bills in detail, and that the names of the insurance companies were immaterial as long as they were sound companies; and thereupon, upon consideration thereof, it is

"Ordered, adjudged and decreed that the defendant render to each of the plaintiffs a detailed statement of all insurance upon each piece of property belonging to the plaintiffs under the defendant's control and charge, including the premiums paid therefor from April 10, 1905, to June 11, 1906, save and except the names of the companies. No costs to be allowed to either party."

The plaintiffs appealed "from the decree of the court in refusing to order the defendant to render to the petitioners the names of the insurance companies in which the defendant carries the insurance upon the property belonging to the plaintiffs and of which he, the defendant, is their agent."

*D. R. Radovsky*, for the plaintiffs.

*A. J. Jennings*, for the defendant.

BRALEY, J. Under the agreement between the parties the defendant while authorized to act as their agent also was given an irrevocable power for a term of five years to manage their property consisting of improved real estate, accounting to each of the plaintiffs for one third of the rents, after retaining in his discretion such sums as might be required for the disbursements

enumerated in the instrument. The bare relation of principal and agent may be insufficient to maintain a bill in equity by the principal for an accounting unless the account is so complicated that it cannot conveniently be stated or settled at law, but the fiduciary character of the relations created by this agreement constituted the defendant, who has accepted the appointment, a trustee. R. L. c. 159, § 3, cl. 6. *Badger v. McNamara*, 123 Mass. 117. *Pratt v. Tuttle*, 136 Mass. 233. *Brown v. Corey*, 191 Mass. 189. *Makepeace v. Rogers*, 4 DeG., J. & S. 649. *Sawyer v. Cook*, 188 Mass. 163, 165. By his acceptance it then became his duty faithfully to administer the property, to keep accounts of all expenditures, and to render an account to the plaintiffs at reasonable times with full information as to all details of his management. The bill charges that in addition to the statement contained in the accounts rendered the plaintiffs requested that the amount of insurance procured and placed on each parcel of the estate, might be further itemized by including the rates paid, and the names of the companies which issued the policies. The presiding judge having found that these corporations were solvent declined to order the defendant to disclose their identity. No satisfactory reason, however, appears why this information should not be given. The plaintiffs were entitled to a full discovery, which was not limited to the financial soundness of the insurers, to be determined by the opinion of their agent, although this opinion, upon his testimony alone, was confirmed by the court. It was the money of the plaintiffs that had been paid, and they had a right fully to explore the entire field of their agent's operations for the purpose of ascertaining whether the disbursements charged had actually been made, and this would include the premiums paid for insurance to companies of which the defendant was the local agent, and in which as far as possible he had placed the insurance.

In a suit in equity a finding of fact upon conflicting evidence, especially where the credibility of witnesses is involved, will not be reversed on appeal even if all the evidence is reported unless clearly wrong. *Poland v. Beal*, 192 Mass. 559. *Harvey-Watts Co. v. Worcester Umbrella Co.*, ante, 138. This rule of practice, however, has no application in the present case, for the finding of financial soundness did not involve a finding that the defend-

ant was not obliged to account further by stating the names of the companies. Such a conclusion is in the nature of a ruling of law, which for the reasons given cannot be sustained. The decree of the Superior Court must be reversed, and the case is to stand for further hearing.

*Ordered accordingly.*

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COUNTY COMMISSIONERS OF BRISTOL, petitioners.

Bristol. October 23, 24, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Acushnet River Bridge. Bridge. County Commissioners. Bristol County. Old Colony Railroad Company. Constitutional Law. Statute, Construction. Interest. Jurisdiction.*

By § 6 of St. 1900, c. 439, relating to the relocation and completion of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, providing that the \$220,000 of the cost of the completion of the bridge under that statute apportioned upon the county of Bristol should be apportioned by the commissioners appointed under St. 1893, c. 368, § 6, "between the cities and towns in the county of Bristol, as provided in said section six," the apportionment is directed to be made among the cities and towns in that county "which are or will be specially benefited" without apportioning any part of the cost to the county of Bristol itself.

The provision of St. 1900, c. 439, § 6, apportioning thirty-three per cent of the excess over \$220,000 of the cost of the completion of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, which carried it over the railroad of the Old Colony Railroad Company instead of crossing it at grade, upon that company to an amount not exceeding \$90,000, is constitutional and valid.

St. 1906, c. 238, authorized the commissioners, appointed under a previous statute to apportion the cost of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, to report their apportionment to the Superior Court so far as such cost had been determined and paid, although certain items of cost remained unascertained and unpaid, and to provide for the apportionment of such part of the cost as had not been ascertained or paid at the date of the report by declaring in what percentages such cost should thereafter be apportioned when it should have been ascertained and paid. *Held*, that, the statute being silent in regard to the manner in which this future apportionment should be made, the proper construction was that it should be made as it would have been if the cost already had been determined and paid at the date of the commissioners' report, that is, under the provisions of St. 1900, c. 439, § 6, the only purpose of the Legislature being to permit the direction of the apportionment before the ascertainment of the amount.

St. 1898, c. 368, amended by subsequent acts, providing for the appointment of a board of three commissioners to apportion the cost of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, made no provision for the payment of interest upon the amounts payable under the report of the commissioners to the Superior Court from the time of the filing of the report until the entry of judgment. *Held*, that R. L. c. 177, § 8, had no application, and that no interest before judgment could be charged.

The commissioners appointed under St. 1898, c. 368, § 6, to apportion the cost of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven were authorized by that section and by St. 1900, c. 439, § 7, to determine and name the cities and towns by which the expense of the care, maintenance and repairs of the bridge and draw with the approaches, abutments and piers should be paid, and also to determine and name the proportion of such expense that should be paid by each of such cities and towns. *Held*, that the determination of the commissioners in regard to the maintenance and support of the bridge was not subject to revision.

KNOWLTON, C. J. This is a petition by the county commissioners of the county of Bristol for the appointment of commissioners to apportion the cost of the construction of a bridge across Acushnet River, between the city of New Bedford and the town of Fairhaven, and the expense of the care and maintenance of this bridge, among the parties liable therefor. The statutes under which the bridge was built are Sts. 1893, c. 368; 1894, cc. 239, 530; 1897, c. 200; 1898, c. 387; 1899, c. 460; 1900, c. 439. A report of the joint board of railroad commissioners and harbor and land commissioners to the Legislature under c. 99 of the Resolves of 1899 was also considered in connection with the statutes. Commissioners were appointed who heard the parties and made a report which was accepted and affirmed by the Superior Court. Judgment was ordered thereon, and certain questions of law were then reported to this court.

The most important of these questions is whether, under the St. 1900, c. 439, § 6, the \$220,000 which is to be apportioned upon the county of Bristol and then "to be apportioned by said commissioners between the cities and towns in the county of Bristol, as provided in said section six," that is, as provided in § 6 of St. 1893, c. 368, is all to be apportioned among the "towns and cities in said county . . . which are or will be specially benefited," or is to be apportioned among said towns and cities and the county of Bristol. The apportionment of the cost that accrued under the St. 1893, c. 368, was to be made among the county of Bristol and the cities and towns in the county of

Plymouth and in the county of Bristol that should be found to be specially benefited. By St. 1899, c. 460, a limitation was put upon the liability of towns and cities in the county of Plymouth. It was then found that a very much larger sum had been expended than the cost as originally estimated, and that a great deal more was needed to complete the bridge. The original plan was for a bridge which would leave the crossing of the railroad on the New Bedford side at grade, but it was then thought important to abolish this grade crossing. Accordingly work was stopped under the legislative resolve of 1899, c. 99, and the board of railroad commissioners and the board of harbor and land commissioners were constituted a joint board to consider the matter and to report to the next General Court various specified facts important in determining what should be done. After consideration of the report made under this resolve, the St. of 1900, c. 439, was passed, which adopted a new plan for future action. The completion of the bridge was taken out of the hands of the county commissioners and entrusted to the city of New Bedford, to be carried out according to plans, specifications and requirements to be furnished by the joint board above mentioned, following the report previously made to the Legislature. This report recommended the abolition of the grade crossing and the construction of the bridge overhead at an expense greatly exceeding that of the grade crossing. The scheme relative to the payment of the cost of that part of the bridge remaining to be built was entirely changed. The apportionment was to be "upon the county of Bristol, two hundred and twenty thousand dollars, to be apportioned by said commissioners between the cities and towns in the county of Bristol, as provided in said section six" of the former statute, and certain percentages were put upon the Commonwealth of Massachusetts, upon the Old Colony Railroad Company, upon the Union Street Railway Company, and upon the town of Fairhaven, and the city of New Bedford was required to pay the balance. By the terms of the former statute the county was to share the expense incurred under it with the cities and towns specially benefited. That expense, as ascertained and reported in the year 1899, was more than \$800,000. It was evidently the purpose of the Legislature to leave the expense of the new

construction to be paid entirely by the parties specially benefited, on the ground that the part of \$800,000 which would ultimately rest as a burden upon the taxpayers of the county, including inhabitants of cities and towns that would not be specially benefited, was as much as ought to be paid by them. So we have the provision putting \$220,000 upon the county and then requiring it to be apportioned "between the cities and towns in the county of Bristol." In this last apportionment the county is left out, and the words, "as provided in said section six," have no other meaning than to incorporate the requirement of that section that the apportionment shall include only such cities and towns as are specially benefited. We are of opinion that the ruling of the commissioners and the court upon this part of the statute was correct.

The Old Colony Railroad Company raises a question as to the thirty-three per cent of the balance above the \$220,000 which the statute requires it to pay. We do not exactly understand the objection. It is not argued that the statute is unconstitutional. It provided for a very important change in the public travel at the crossing, which is beneficial to the corporation as well as to the public. The public travel is now carried over the railroad instead of crossing it at grade. Whether the public crossing at grade is technically abolished or not in view of the fact that there are two abutters on the old way between the railroad and the river, there is no doubt of the constitutional authority of the Legislature to impose a part of the expense of this change upon the railroad company. *Norwood v. New York & New England Railroad*, 161 Mass. 259. The ruling on this point was correct.

The petition for the appointment of commissioners to apportion the cost was filed on July 8, 1904. After hearings at length before the commissioners, it was found that the apportionment could not be completed because a part of the cost had not been ascertained, owing to the pendency of suits for the determination of damages to land. Thereupon the St. 1906, c. 238, was passed, providing for an apportionment of such cost as had been determined and paid, and "for the apportionment of such part of the cost as has not been ascertained or paid at the date of its report by declaring in what percentages such cost shall

hereafter be apportioned when it has been ascertained and paid." This statute is silent in regard to the manner in which this last apportionment shall be made, and the question arises whether it changes the provisions by which the commissioners would have been governed if this cost had been determined previously. There is nothing to indicate an intention of the Legislature to make such a change. There was no change unless by the failure to state expressly in the second section, by what principles the commissioners should be governed in making the apportionment, the statute left them to adopt any method that they should deem best. If this failure to say anything on the subject repealed the provisions of the law applicable to the apportionment of this cost had it been determined previously, the commissioners might put a large part of it upon the county of Bristol, or distribute it in any way in which the Legislature may distribute such expenses. We do not think this is the true meaning of the statute. The natural construction of it is that the apportionment should be made as it would have been if the cost had been determined and paid, the only purpose of the Legislature being to permit the apportionment before the ascertainment of the amount.

There is no doubt that this cost, if it had been determined previously, would have been a part of that to be paid under the St. 1900, c. 439, § 6, in the proportions of twelve per cent by the Commonwealth, thirty-three per cent by the Old Colony Railroad Company, ten per cent by the Union Street Railway Company, five per cent by the town of Fairhaven, and forty per cent by the city of New Bedford, subject to a limitation of the aggregate amount payable by these parties, respectively, except the last, and to a possible increase upon the city of New Bedford by reason of this limitation. We are of opinion that the apportionment should be modified so as to make the percentages conform to this part of the statute.

A single question remains as to interest upon the amounts payable to the county of Bristol for the time from the filing of the report to the time of the entry of judgment. This question arises under the St. 1893, c. 368. This statute makes no provision for a payment of interest during this period. It is not contended that interest can be allowed as damages on the ground



that the money is wrongly detained after it becomes payable, for it cannot be paid until after the judgment is entered. It is not within the language of R. L. c. 177, § 8, which relates only to awards of county commissioners, committees or referees, or reports of auditors or masters in chancery, or verdicts of juries. This statute was in force at the time of the decision in *Needham v. Wellesley*, 139 Mass. 372, 376, which in this particular is almost identical with the present case, and which holds that such interest cannot be charged. See also *Hendrick v. West Springfield*, 107 Mass. 541; *Bowers v. Hammond*, 139 Mass. 860. The allowance of this interest was erroneous.

The determination of the commissioners in regard to the maintenance and support\* of the bridge cannot be revised in this court.

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\* The commissioners were Hon. James R. Dunbar, Hon. Frederic Dodge and Hon. Dana Malone. They were appointed under § 6 of St. 1893, c. 368, which provides among other things, as follows: "Said commissioners named in this section shall also determine and name the cities and towns by which the expense of the care, maintenance and repairs of said highway bridge, draw, including approaches, abutments and piers, shall be paid, and also determine and name the proportion of said expense that shall be paid by each of such cities and towns."

Section 7 of St. 1900, c. 439, is as follows:

"Section 7. Said commissioners shall determine and name the proportion of the expense of the care, maintenance and repairs of that part of said bridge and of the approaches thereto constructed under this act, that shall be paid by such cities and towns in the county of Bristol, as said commissioners shall designate, in the manner provided in said section six of said chapter three hundred and sixty-eight. The Old Colony Railroad Company shall maintain and keep in repair the framework of that part of said bridge constructed over its location, together with all abutments, piers and supports for the same within said location, and the surface thereof and its approaches shall be maintained and kept in repair by the city of New Bedford, in accordance with the provisions of section six of chapter four hundred and twenty-eight of the acts of the year eighteen hundred and ninety."

The report of the commissioners contained the following decision under these provisions:

"We determine that the expense of the care, maintenance and repairs of said highway, bridge, draw, including approaches, abutments and piers, constructed under the provisions of said chapter 368 [of St. 1893] shall be paid by the city of New Bedford and the town of Fairhaven, and in the proportion of twenty per cent by Fairhaven and eighty per cent by New Bedford; and that the expense of the care, maintenance and repair of that part of said bridge and of the approaches thereto constructed under said chapter 439

The report is to be modified as to the apportionment of the cost not yet determined, and the interest referred to is to be disallowed.

*So ordered.*

*F. S. Hall, (J. M. Swift with him,) for the county of Bristol.*

*W. B. Perry, for the city of New Bedford.*

*C. W. Clifford, for the town of Fairhaven.*

*H. A. Dubuque, for the city of Fall River.*

*O. Prescott, Jr., for the Union Street Railway Company, submitted a brief.*

*J. H. Benton, Jr., for the Old Colony Railroad Company, submitted a brief.*

*W. C. Parker, for the town of Dartmouth, submitted a brief.*

*W. B. Perry, L. W. Jenney & G. H. Potter, for the town of Acushnet, submitted a brief.*

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[of St. 1900], shall be paid by the city of New Bedford and the town of Fairhaven in the proportion of twenty per cent by said town and eighty per cent by said city, except that the Old Colony Railroad Co. shall maintain and keep in repair the framework of that part of said bridge constructed over its location, together with all abutments, piers and supports for the same within said location, and the surface thereof and its approaches shall be maintained and kept in repair by the city of New Bedford as provided in section 7 of said chapter 439 [of St. 1900], and excepting also that the expense of the care, maintenance and repair of so much of the approaches of said bridge as were constructed under the provisions of section 10 of said chapter 439 shall be entirely paid by the city of New Bedford."

The town of Fairhaven contended that the distribution of the gross cost of maintenance between New Bedford and Fairhaven at twenty per cent to Fairhaven and eighty per cent to New Bedford was not just and equitable.

CHARLES L. JAMES vs. INTERSTATE CONSOLIDATED STREET  
RAILWAY COMPANY.

Bristol. October 24, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence. Street Railway.*

In an action against a street railway company for personal injuries, if the plaintiff testifies that, late in the afternoon of a day in December when it was very dark, he was driving in a heavy express wagon, ten feet long, and swung his horse around upon the track of the defendant's railway for the purpose of backing up in front of a house to unload a barrel of flour, that before doing so, and also as he swung his horse around, he looked and listened in both directions and saw no car and heard no noise, gong or signal, and as he swung his horse back on the track again for the purpose of backing up and unloading he saw, by means of the light reflected on its side, a car approaching, without any headlight and giving no signal of its approach, one hundred feet or one hundred yards away and coming toward him fast, that he shouted to his horse to go ahead and the horse got across the track but the back of the wagon was struck by the car and the plaintiff was thrown out and injured, and if the motorman testifies that he rang his gong and that when he saw the wagon driven by the plaintiff about fifty feet ahead he shut off the power, reversed the motors and put on the air emergency brake, and had reduced the speed of the car to ten miles an hour when the collision occurred, and if both he and the conductor testify that the headlight was lighted, the questions, whether the plaintiff used due care in the management of his team and in his efforts to ascertain whether a car was approaching and whether the defendant was negligent in the management and equipment of its car, are questions of fact to be submitted to the jury.

TORT by the driver of an express wagon for personal injuries caused by a collision with an electric car of the defendant. Writ dated October 12, 1904.

In the Superior Court the case was tried before *Bell, J.* The plaintiff was a teamster driving an express wagon, and was about to deliver a barrel of flour at the house of one Powers on the west side of Washington Street, a public highway in Attleborough. The horse driven by the plaintiff weighed about fourteen hundred pounds and the express wagon was ten feet long and four feet wide inside. The accident happened between 5.15 and 5.20 P. M. on December 14, 1903, at a time when it was cold and very dark. The car that struck the plaintiff was going north from Pawtucket to Attleborough, on the west side of

Washington Street. The plaintiff testified that when he drove up to Powers' house he stopped his wagon on the right hand side of the car track about four feet from the rail in the travelled part of the road, which was from sixteen to twenty feet wide at that point; that he went into Powers' house and ascertained where the flour was to be put, and then came back to his wagon for the purpose of backing up and taking out the barrel of flour; that there was no driveway in the Powers yard; that going into Powers' yard and coming out of it he had to cross the track, and that going and coming he looked both ways and did not see or hear any car approaching from either side; that he then mounted his wagon, spoke to his horse and started in a circle to the left; that his wagon was perhaps three or four feet beyond Powers' steps when he first stopped, and was facing north; that, as he circled around to the left after coming out of Powers' house and getting on his wagon, he looked and listened in both directions and did not see any car or hear any noise, gong or signal; that he looked and listened while he was in his wagon on the track; that his horse crossed the track as he was circling around, his horse swinging to the left, and that when he got him around he swung him back on the track again for the purpose of backing up and unloading; that, when the horse went over the track, part of the wagon remained on the track; that when he had got the body of the wagon on the tracks and part of the horse he saw a car approaching "without any headlight in front of it burning"; that it gave no signal of its approach; that he was listening; that he saw it by the light reflected on the side of the car; that it might have been one hundred feet away or one hundred yards, when he first saw it; that he "could not rate" the speed of the car, but it was coming fast; that he never saw one coming toward him any faster than that did; that he shouted to his horse to go ahead, and that the horse started ahead and got across the track but no part of the wagon could get across before the collision came; that about the forward wheels got over and that then the car struck the wagon; and that he was thrown out and received his injuries; that his horse was walking as he was circling around all the time; that his wagon was a cut-under wagon, with a foot board, and that the seat was about six feet from the ground.

The defendant called as a witness the motorman in charge of the car, who testified, among other things, that as he approached the place of the accident the headlight was lighted and he could see it shining on the track ahead; that he rang his gong; that when he first saw the wagon driven by the plaintiff it was about fifty feet ahead of him; that he immediately shut off the power and reversed the motors and put on the air emergency brake; and that he had succeeded in diminishing the speed of the car from about twelve or thirteen miles an hour to about ten miles an hour when the collision occurred. The conductor testified that the front headlight, the rear platform lights and the inside lights of the car all were lighted; that the car was in first class working condition and was running smoothly; that he could not say that he noticed the reverse put on or any jerk of the car before the collision; that the car was going from twelve to fourteen miles an hour as it came down toward the Powers house just before the collision; and that nothing about the speed of the car or the motion of the car out of the ordinary attracted his attention just before the collision.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover, and that the plaintiff was not in the exercise of due care at the time of the accident. The judge refused to rule as requested and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$3,525. The defendant alleged exceptions.

*F. S. Hall*, for the defendant.

*J. W. Cummings*, (*C. R. Cummings* with him,) for the plaintiff.

HAMMOND, J. As frequently happens in cases of this kind, the evidence as to many of the material points was very conflicting. We have carefully examined it, and are of opinion that the questions whether the plaintiff in the management of his team and in his efforts to ascertain whether a car was approaching used due care, and whether the defendant in the management and equipment of its car was negligent, were questions of fact and not of law. The case was properly submitted to the jury.

*Exceptions overruled.*

CHESTER W. DURFEE vs. MARY A. MEADOWCROFT,  
administratrix, with the will annexed, & another.  
THOMAS D. WARBURTON vs. JAMES MOORE & trustee.

Bristol. October 24, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Chattel, Life interest. Personal Property. Contract, Construction. Execution. Practice, Civil. Trustee Process.*

The questions, whether the owner of a building which is personal property can create a life interest in it in favor of another with a reversion in himself, and, if so, whether such an interest can be created orally, here were not passed upon, the court assuming that such an interest could be created and could be created orally, for the purpose of deciding the case upon the point that the oral arrangement alleged to have transferred a life interest in the building was merely an executory contract.

A wooden building standing on leased land was owned as personal property by a woman with a husband and two daughters. The owner died leaving a will, not assented to by her husband, bequeathing all her property to her daughters equally. One of the daughters was appointed administratrix with the will annexed. The surviving husband made an arrangement with his daughters by which "he transferred all his interest in his wife's estate to them, and they agreed that he should take charge of the wooden building, collect the rents, pay all the expenses, and from the balance left, if any, should keep \$3 a week for his living expenses, and pay over the remainder" to the administratrix. This arrangement was to continue during his life and the estate was not to be settled until after his death. He took possession of the building and continued to occupy it, collecting and receipting for the rents in his own name, settling losses with insurance companies, paying the charges and taking out the \$3 a week, after which there was nothing left to be paid to the administratrix. A judgment creditor of the surviving husband seized and sold his alleged interest in the building under an execution against him, and the purchaser at the execution sale brought a suit in equity against the two daughters under R. L. c. 159, § 8, cl. 4, alleging that he and the defendants were joint owners of personal property, and seeking to have their respective rights determined and the building sold and the proceeds distributed. *Held*, that, assuming without deciding, that the owner of a chattel can create a life interest in it in favor of another with a reversion in himself, and that this can be done orally, and also that, the estate being free from debt, the administratrix with the consent of her co-legatee could create such an interest in the building, and that a gift or transfer of the income or use for life accompanied by possession of the building would constitute such an interest, yet the arrangement between the father and his daughters did not transfer to the father any interest in the building but on the part of the executrix and her co-legatee was merely an executory contract; so that nothing passed to the plaintiff by the seizure and the sale on execution.

Where an action of contract, begun by trustee process, in which a judge of the Superior Court ruled that the trustee should be discharged, comes to this court by report, and it appears that the trustee had in his hands no goods, effects or

credits of the defendant, so that the ruling of the judge was right, but no reason appears why the plaintiff is not entitled to judgment for a balance due to him and there is no way of ascertaining from the report what that balance is, the case will be remitted to the Superior Court with directions to ascertain the amount due and, when it is ascertained, to enter judgment accordingly in favor of the plaintiff.

MORTON, J. These two cases were heard together and come here on report. The first is a suit in equity and the second an action at law. Both, it is stated in the report, are founded on the same cause of action. In the equity cause such decree is to be entered as equity and justice require, and in the action at law such judgment as law and justice require. The controversy relates to a wooden building standing on leased land. It is alleged in the bill in equity that the plaintiff and defendants are joint owners of the building, and the bill seeks to have their respective rights determined and the building sold and the proceeds distributed under R. L. c. 159, § 3, cl. 4. The facts as stated in the report may be summarized as follows: The building was owned by one Mary A. Moore, the wife of the defendant James Moore, at the time of her death; her heirs at law were her husband and two daughters, the other two defendants; she left a will, which was not assented to by her husband, bequeathing all her property equally to the daughters; the defendant Meadowcroft was duly appointed administratrix with the will annexed; after the death of his wife an oral arrangement was entered into between James Moore and his daughters whereby "he transferred all his interest in his wife's estate to them, and they agreed that he should take charge of the wooden building, collect the rents, pay all the expenses, and from the balance left, if any, should keep three dollars a week for his living expenses, and pay over the remainder to the defendant Meadowcroft"; this arrangement was to continue during his life and the estate was not to be settled till after his death. Moore took possession under this arrangement and has continued to occupy under the same ever since, letting the store and tenements and collecting and receipting for the rents in his own name and settling with the insurance companies for losses that have twice occurred through fire: it is found that after paying the charges on the building and taking out the \$3 a week there was nothing left to be paid to the defendant Meadowcroft.

The judge found that the object of this arrangement was to provide for Moore's support during his life, but that the parties did not consider the question of what interest, if any, they were transferring to Moore, and the defendant Meadowcroft did not consider whether she was making the agreement as administratrix or as one of the next of kin. The judge found as a fact that she made the agreement as administratrix, and ruled and found as a fact, so far as it involved a question of fact, that the effect of this action on her part was to transfer to Moore a life interest in the building. The plaintiff Durfee contended that this interest had passed to him by virtue of a seizure and sale on an execution issued upon a judgment obtained by Warburton against Moore, and the judge so ruled; but also ruled that on account of the inadequacy of the consideration paid by Durfee it would be inequitable to aid him in enforcing his legal rights and declined to do so. Thereupon a stipulation was entered into between the plaintiff Durfee and Warburton that the former should hold as trustee for the benefit of the latter, and after a further hearing upon the bill as amended by making the defendant Moore a party and in other respects, the judge ruled in substance that the bill could not be maintained against the original defendants, the daughters, on the ground that they had no joint interest or possession of the building with the plaintiff, and that it could only be maintained by the plaintiff against Moore as trustee for Warburton, and as we understand the report the judge held, in effect, that it could be so maintained.

The principal question is whether Moore took an interest in the building for his life or otherwise. We assume in favor of the plaintiff Durfee, without deciding, that the owner of a chattel personal can create a life interest in it in favor of another with a reversion in himself, and that such an interest may be created orally as well as by deed. We also assume in his favor, without deciding, that, the estate being free from debt, the administratrix with the consent of her co-heir could create such an interest in the building, which must be regarded as a chattel personal, and that a gift or transfer of the income or use for life accompanied by possession of the building would constitute such an interest. See Gray, Rule against Perpetuities, §§ 91 *et seq.* But there was no gift or transfer of the income or use for life



and nothing it seems to us tantamount to the transfer or creation of a life interest in the building. The agreement was that Moore should take charge of the building, collect the rents, pay all the expenses, retain \$3 a week for his living expenses, and pay over the balance if any to the defendant Meadowcroft. This arrangement did not transfer to Moore or create in his favor any interest in the building. It was a purely personal contract or undertaking between him and the other parties to it. Its nature was not affected by the fact that it was to continue during his life and was intended as a provision for his support. It is not found and there is nothing to show that the administratrix and her sister intended to transfer a life interest to him. The fact that he has had possession of the building under the arrangement that was entered into does not operate to vest such an interest in him if no such interest was created by the contract. And it is immaterial that he has rendered no account and that the defendant Meadowcroft by reason of charges on the building and the \$3 a week taken out by Moore for his living expenses has received nothing from the building. It follows from what we have said that nothing passed to the plaintiff Durfee by the seizure and sale on execution and that his bill must be dismissed.

In regard to the action at law by Warburton, in which Meadowcroft as administratrix was summoned as trustee, we think that the ruling of the judge in ordering that the trustee be discharged was right. The defendant Moore had transferred all his interest in his wife's estate to his daughters, and the administratrix had therefore no goods, effects, or credits of the defendant in her hands. We do not see, however, why the plaintiff is not entitled to judgment for the balance due him. But, as there is no way of ascertaining from the report what that balance is, the action must be remitted to the Superior Court with directions to ascertain the amount due and, when ascertained, to enter judgment accordingly in favor of the plaintiff.

*Bill dismissed with costs ; order discharging trustee affirmed ; action at law remitted to Superior Court with directions to ascertain amount due the plaintiff and when ascertained to enter judgment accordingly.*

*F. A. Pease, for the plaintiffs.*

*F. Wasserman, (D. Silverstein with him,) for the defendants.*

GEORGE W. BROWN, executor, vs. JOSEPH CLOTHEY  
& others.

Essex. November 7, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALLEY, SHELDON, & RUGG, JJ.

*Devise and Legacy. Words, "Glue," "On hand."*

On a bill by an executor for instructions the following facts appeared: The plaintiff's testator in the seventh clause of his will made this bequest: "I give and bequeath all the glue (but not the glue stock) which I may leave on hand at my decease" to a trustee for the benefit of certain beneficiaries. To a brother not included in these beneficiaries he made the following bequest: "I give and bequeath to my said brother all the tools, fixtures and machinery in my glue factory, and all my personal property of whatever kind or description that at the time of my death shall be in or on the premises described in section second of this will [which described the glue factory], excepting the glue, which I have hereinbefore disposed of in section seven of this will." It appeared that at the time of his death, the testator had on hand in his glue factory a large quantity of glue and also a large quantity of gelatine, worth a little more than the glue. He also had in the hands of a selling agent in another city another quantity of gelatine. Glue and gelatine are made from the same stock and by the same process of manufacture, there being no difference between gelatine and common glue except that gelatine is a higher grade of the same substance. There was evidence that, although gelatine and glue are sold in the market under different names, from the point of view of manufacturers they are both in a broad general sense glue, and that the manufacture of gelatine as a distinct product for a use different from that of common glue had begun in the testator's factory and other similar factories not very long before the will was made. There was no mention in the will of gelatine as distinguished from glue. *Held*, that the word "glue" included gelatine and that the words "on hand" included the goods sent away to be sold by the selling agent as well as those at the factory, so that both quantities of gelatine passed to the trustee.

KNOWLTON, C. J. This is a bill brought by the executor of the will of William H. Brown, for instructions. The first part of the seventh clause of this will is as follows: "I give and bequeath all the glue (but not the glue stock) which I may leave on hand at my decease to said trustee, the said George and his successors, in trust for the following purposes," etc. For many years the testator had been a manufacturer of glue, and at the time of his death he had on hand in his glue factory two hundred and seventeen barrels of glue worth about \$2,800 and three hundred and twenty gross of gelatine worth a little more than

that sum. He also had in the custody of his selling agents in New York city about one hundred and thirty gross of gelatine. The question is whether this gelatine passed as glue under the seventh clause of the will.

It appeared from uncontradicted evidence that glue and gelatine are made from the same stock and by the same process of manufacture. The last part of this process is boiling in a kettle, through a valve in the bottom of which the liquid is drawn off into shallow pans and allowed to cool. The first drawing, which is the clearest and best, is afterwards broken up or shredded and put up in packages to be sold for cooking and other uses under the name gelatine. The later drawings, which have more impurities, are sold as glue. The building in which this business was carried on was commonly called, and is called by the testator in his will, a glue factory. An intelligent and trustworthy expert of large experience testified that "gelatine is the highest grade of glue," and that he knew no difference between gelatine and common glue, except that gelatine is a higher grade of glue. To an inquiry in reference to a statement that "nearly all gelatine in the market is really made from glue," he answered, "instead of saying that, I should say it is glue."

While the evidence tended to show that these preparations, designed for different uses and put up in different forms, are known and sold in the market under different names, there was much other evidence to indicate that, from the point of view of manufacturers, they are both in a broad, general sense, glue. The evidence tended to show that the manufacture of gelatine, as a distinct product for a use different from that of common glue, was begun in the testator's glue factory and other similar factories not very long before the will was made.

The question is, What did the testator mean by the word "glue" as used in his will? Did he mean the entire finished product of his glue factory, including that prepared for cooking under the name gelatine, or did he mean to limit the gift to that which is commonly sold by dealers under the name glue? The first part of the eighth clause of the will is in these words: "I give and bequeath to my said brother George W. Brown all the tools, fixtures and machinery in my glue factory, and all my

personal property of whatever kind or description that at the time of my death shall be in or on the premises described in section second of this will, excepting the glue, which I have hereinbefore disposed of in section seven of this will," etc. The glue factory is a part of the premises described in section second. These two clauses indicate an intention to separate the finished product, under the name glue, from the glue stock and all other property in the glue factory, and to give the former to a trustee for his nephews and sisters, and the latter to his brother for his own use. Nowhere in the will is there any mention of gelatine, or any suggestion that the product of his glue factory is anything but glue. The single justice found that the word "glue" included the gelatine in the factory, and affirmed the decision of the Probate Court to that effect. This decree of the single justice, made after seeing and hearing the witnesses, we cannot set aside on appeal unless it is plainly wrong. The evidence before us tends to show that it is right.

The gelatine in the custody of the testator's selling agent in New York passed under this seventh clause if it was included in the words, "which I may leave on hand at my decease." It might be argued that "on hand" means at my factory, and does not include goods sent away to be sold by a selling agent. No such argument has been addressed to us, nor has any reason been given why the gelatine which remained unsold in New York should not be covered by this clause, as well as that in the factory.

The single justice, upon the record before him, rightly declined to affirm that part of the decree of the Probate Court which deals with items of money and interest that properly are for adjustment in the executor's account. There seems to be a difference of opinion between counsel as to the effect of his decree in reference to the gelatine in New York. To remove ambiguity it should be amended by substituting the words "referred to in the plaintiffs' bill," for the words, "in the factory of the testator," and with this amendment it should be

*Affirmed.*

*G. C. Abbott*, for the plaintiff.

*R. M. Mahoney & W. H. Niles*, for the defendants.

## SAMUEL COFFIN vs. ARTESIAN WATER COMPANY.

Essex. November 7, 1906. — November 27, 1906.

Present : KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, &amp; RUGG, JJ.

*Practice, Civil, Agreed statement of facts. Tax. Corporation, Foreign. Way.*

In a case presented on an agreed statement of facts which does not provide that the court may draw inferences of fact the plaintiff cannot recover unless the matters stated entitle him to a judgment as a matter of law.

The pipes and mains of a water company are not machinery employed in any branch of manufactures within the meaning of the second exception of R. L. c. 12, § 23, in regard to the assessment of personal property for taxation.

In an action by the collector of taxes of the town of Salisbury against a foreign corporation supplying the public at Salisbury Beach with water, to recover a tax assessed upon the defendant's water mains and pipes as personal property, on the ground that they were underground pipes laid in public streets by a corporation other than a street railway company within the meaning of St. 1902, c. 842, § 1, the case was submitted on an agreed statement of facts without the power to draw inferences, by which it appeared that all the water mains and pipes assessed ran through private land without any question except two hundred feet which were under a way seventy-five feet wide on Salisbury Beach on land which before August, 1903, had belonged to a *quasi* corporation called the Commoners of Salisbury, and that the town in July, 1903, had given to the Commoners of Salisbury a release containing this exception: "Excepting however from this conveyance any right of the public and the marsh owners in and to the old way to the marshes as the same now exists, and is used, and in and to the way seventy-five feet wide running across said beach in continuation of the town road leading to the same, . . . and reserving to itself and its successors the right to use and to permit any person residing in said town to use for purposes of travel only . . . the way seventy-five feet wide as now laid out extending from the present highway to the sea. . . . The location of said ways may be changed from time to time as agreed in writing by the selectmen of said town and by said Commoners, their successors and assigns." *Held*, that there was no statement that the way seventy-five feet wide was a public street, and that if inferences could have been drawn it might have been inferred that it was not; so that the case was not brought within the statute and the water mains and pipes were not taxable as personal property.

Whether the water mains and pipes of a foreign corporation supplying water to a portion of a town, laid entirely through private land, the corporation "having a lease to maintain said pipes from the owners of the fee," can be assessed to the corporation as real estate, here was not considered, the only question raised being whether the mains and pipes were taxable as personal property.

CONTRACT by the collector of the town of Salisbury to recover a tax of \$402 assessed in 1903 upon the defendant's water mains

and pipes in that town as personal property, with interest from November 1, 1903. Writ dated March 13, 1905.

The case was submitted to the Superior Court upon an agreed statement of facts, which contained no agreement that the court might draw inferences of fact. The material facts appear in the opinion. The Superior Court gave judgment for the defendant; and the plaintiff appealed.

*J. T. Choate*, for the plaintiff.

*H. I. Bartlett*, for the defendant.

KNOWLTON, C. J. This is an action to recover a tax on property of a foreign corporation. The tax was assessed on the defendant's water mains and pipes which supply the public with water at Salisbury Beach. The case was submitted on an agreed statement of facts which contains the following sentence: "Unless the defendant is taxable in Salisbury for said pipes and mains as personal property the defendant is entitled to judgment." This sentence presents the only question before us.

The defendant's pumping station is situated about one-half a mile from Salisbury Beach, "and the pipes and mains except as hereinafter stated are entirely upon private land, the defendant having a lease to maintain said pipes from the owners of the fee, made, and the pipes laid in 1902." The exception referred to arises from the fact that about two hundred feet of the pipes are within a way seventy-five feet wide on Salisbury Beach. This beach is owned by a corporation which succeeded the Commoners of Salisbury, a *quasi* corporation, in August, 1908. "Said Commoners had title and claimed exclusive title in fee to all said beach for many years. In a certain release given by said town to said Commoners in July, 1908, there was the following: 'Excepting however from this conveyance any right of the public and the marsh owners in and to the old way to the marshes as the same now exists, and is used, and in and to the way seventy-five feet wide running across said beach in continuation of the town road leading to the same, . . . and reserving to itself and its successors the right to use and to permit any person residing in said town to use for purposes of travel only . . . the way seventy-five feet wide as now laid out extending from the present highway to the sea. . . . The location of said ways may be changed from time to time as agreed in writing by

the selectmen of said town and by said Commoners, their successors and assigns.' ”

In a case presented on an agreed statement of facts which contains no clause authorizing the court to draw inferences of fact, the plaintiff cannot recover, unless the matters stated entitle him to a judgment against the defendant as a matter of law. *Old Colony Railroad v. Wilder*, 187 Mass. 586, 588.

The defendant, being a foreign corporation, is not taxable upon personal property in this State under the general provisions of the statute, unless the property is within some of the exceptions referred to in R. L. c. 12, § 23. *Flanders v. Cross*, 10 Cush. 514, 516. *Harrington v. Glidden*, 179 Mass. 486, 491. The only exception in the statute, relied on by the plaintiff, is that relating to machinery employed in manufactures. It has been decided that pipes and mains like these are not such machinery. *Dudley v. Jamaica Pond Aqueduct*, 100 Mass. 183. *Hittinger v. Westford*, 135 Mass. 258. *Wellington v. Belmont*, 164 Mass. 142.

The plaintiff also invokes St. 1902, c. 842, which amends this section of the Revised Laws. But this statute relates only to “underground conduits, wires and pipes laid in public streets by any corporation, except street railway companies,” etc. The agreed facts do not show as matter of law that any of the defendant's pipes are laid in a public street. It appears affirmatively that all but two hundred feet of them are not in a public street, and it does not appear that the way seventy-five feet wide is a public street. Indeed, if we were to draw inferences, it would seem probable that it is not a public street. It is described as a continuation of the town road, which implies that it is not a town road. It appears that the Commoners had title and claimed exclusive title to this land for many years, and in the release of the town to them, made later, there is only a reservation of any public rights that may exist, without proof that any do exist. The provision for a change of the location of these ways from time to time by agreement of the parties implies that they are not public streets. The case, therefore, is not brought within the St. 1902, c. 842, and, so far as appears, the pipes and mains were not taxable to the defendant as personal property.

Whether the defendant's holding under a lease is such as to make the pipes and mains real estate may depend upon facts which are not stated. At all events we have no occasion to consider the question at this time.

*Judgment affirmed.*

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WILLIAM E. BAILEY vs. ALVIN F. MARDEN.

Essex. November 7, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Contract*, Implied : common counts, Performance and breach. *Practice*, Civil, Findings of fact by judge.

In an action to recover compensation for hauling wood from a woodlot of the defendant, it was found by a judge, sitting without a jury, that the agreement was that the plaintiff should haul all the wood at the price of one dollar a cord, the defendant to cut it and have it ready for him, that the agreement made no provision for deferment of payment until all the wood was hauled, that the plaintiff performed his part of the contract as far as he could, and that there was a breach of the contract on the part of the defendant. It appeared that the plaintiff hauled all the wood that the defendant had cut and ready at a certain time, and was paid for it, that, there being no more wood ready at that time, he went to another job, and afterwards returned and hauled more wood for the defendant, for which the defendant refused to pay him until all the wood on the lot had been hauled away. *Held*, that, even if the contract was an entire one to haul all the wood upon the lot, the defendant by his breach of the contract having prevented full performance on the part of the plaintiff, the plaintiff was entitled to recover on a *quantum meruit* the fair value of the work done by him.

The findings of fact of a judge sitting without a jury will not be revised unless it is made to appear that they were unwarranted by the evidence.

CONTRACT on an account annexed to recover compensation for hauling wood for the defendant in November, 1905. Writ dated December 22, 1905.

In the Superior Court the case was tried before *Harris, J.*, without a jury. The substance of the case is stated in the opinion.

The testimony of the defendant referred to in the opinion is stated in the bill of exceptions as follows :

The defendant testified that the agreement between the plain-



tiff and himself was that the plaintiff should haul all the wood on the lot at one dollar per cord, the defendant to have the wood ready as soon as he could; and that the plaintiff hauled until he caught up with the choppers. The defendant further testified that there were choppers on the lot all the time, sometimes one or two and sometimes seven or eight; that in October when there was wood cut and made ready on the lot the defendant asked the plaintiff to finish the lot and the plaintiff said he would as soon as he finished the job he was then on; that the plaintiff took up the work again; that when the plaintiff came to the defendant for money the defendant declined to pay him until he finished the lot, on the ground that the plaintiff had left the bottoms of the piles and because the defendant had heard the plaintiff was to leave the job. The defendant testified that one dollar a cord was a fair price for hauling the entire lot. In answer to the question of the plaintiff's attorney, "Did you tell Allen Tarbox that you owed Bailey and would have to pay him?" the defendant replied, "No, sir. I told him I owed him for wood hauled, I supposed there was some value there due him." When asked "And you still think there is some value there due him?" he replied, "Certainly."

At the close of the evidence the defendant asked the judge to rule: 1. That upon all the evidence the plaintiff is not entitled to recover. 2. That the contract between these parties was entire. 3. That the plaintiff cannot recover on a *quantum meruit*. 4. That the conduct of the plaintiff in resuming work after the date of the alleged breach by the defendant was a waiver of the alleged breach.

The judge refused to make any of these rulings. He made the findings of fact which are stated in the opinion, and found for the plaintiff in the sum of \$34.78. The defendant alleged exceptions.

*R. F. Metcalf*, for the defendant.

*G. Mitchell, Jr.*, for the plaintiff.

RUGG, J. This is an action of contract to recover compensation for hauling wood for the defendant. The declaration is upon an account annexed. The plaintiff contended that the defendant made an oral contract, under which the plaintiff was to haul for the defendant some wood from the lot where it was

cut to a coal yard, for which the defendant was to pay the plaintiff one dollar per cord. The plaintiff hauled all the wood which the defendant had cut and ready for him in September, 1905, and was paid for it. There being no more wood ready at the time he went to another job, returning to work upon the defendant's lot in November of the same year. The defendant refused to pay anything for this work until all the wood upon the lot had been hauled away, hence this action. In the Superior Court, where the case was heard without a jury, the judge found as a matter of fact that the agreement was that the plaintiff should haul all the wood at the price of one dollar a cord, the defendant to cut it and have it ready for him; that the agreement made no provision for deferment of payment until all the wood was hauled, that the plaintiff performed his part of the contract as far as he could, and that there was a breach of the contract on the part of the defendant.

The bill of exceptions does not purport to disclose all of the evidence, but the testimony of the defendant abundantly justifies the findings made by the judge who heard the case and the verdict rendered by him. The prayers presented by the defendant were all immaterial, in view of the testimony of the defendant and the facts found. Even if the contract as originally made was entire, to haul all the wood upon the lot, yet it was broken by the defendant without fault on the part of the plaintiff, and under these circumstances the latter is entitled to recover on a *quantum meruit* the full value of the work done by him. The defendant cannot be permitted to set up a contract, the performance of which he himself has prevented, as a bar to paying the plaintiff his fair compensation. *Fitzgerald v. Allen*, 128 Mass. 232. *DeMontague v. Bacharach*, 187 Mass. 128. But even if the facts were not so clearly against the defendant, we could not attempt to pass upon the weight and effect of the evidence and revise the finding, provided there were facts and circumstances upon which the finding might be based, nor unless it appeared that it was unwarranted by the evidence. *Wylie v. Cotter*, 170 Mass. 356.

*Exceptions overruled.*

ELLEN M. CREEDEN, administratrix, vs. BOSTON AND MAINE  
RAILROAD.

Essex. November 9, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Constable. Officer. Arrest. Railroad. Carrier. Watch and Ward. Words,  
"Criminals," "Abroad."*

Enumeration by *Rugg, J.*, of statutes under which a constable authorized to serve criminal process may make an arrest without a warrant.

If a constable, who is an officer of the watch authorized to serve criminal process and has been informed and believes that criminals are escaping in a train of a railroad company which is stopping at a station, enters the train, not to serve a warrant but "for the purpose of apprehending said criminals," he has no rights against the railroad company greater than those of a mere licensee, and the company is under no obligation to furnish a safe place for him to alight from the train, there being many persons properly described as criminals whom he would have no right to arrest without a warrant.

A constable, who is an officer of the watch authorized to serve criminal process, entering a passenger train of a railroad company in the night-time for the alleged purpose "of examining certain persons abroad" whom he has reason to suspect of an unlawful design, has no rights against the railroad company greater than those of a mere licensee, and the company is under no obligation to furnish a safe place for him to alight from the train, passengers in a railroad train not being "persons abroad" within the meaning of R. L. c. 31, § 2.

A passenger on a train of a railroad company who has placed himself in the hands of the carrier for transportation is not "abroad" within the meaning of R. L. c. 31, § 2, authorizing watchmen appointed under that chapter during the night-time to "examine all persons abroad whom they have reason to suspect of an unlawful design" and to arrest persons so suspected who do not give a satisfactory account of themselves.

TORT by the administratrix of the estate of Patrick Creeden of Newburyport for the benefit of his widow and children under R. L. c. 111, § 267, to recover damages for causing his death. Writ dated March 6, 1906.

The declaration alleged that the defendant on December 26, 1905, operated a steam railroad through Newburyport and for a long time previous to the injuries complained of had maintained a station in Newburyport at which its trains stopped, for the purpose of taking on and letting off persons rightfully upon its trains; that contiguous to and adjoining the station was a bridge spanning Merrimac Street in that city, which was constructed

without railings, barriers, lights, warnings or safeguards; that between the outer rail of the track and the girder of the bridge there was a piece of timber running lengthwise with the bridge and extending about two inches above its surface; that beyond this timber planks were laid at an angle with the surface of the bridge, sloping upward and outward to the girder, so that they formed an inclined plane running the whole length of the bridge, joining the girder in such a way as to cause a person walking beyond the outer rail to pitch forward toward and over the girder, and that this condition could not be observed owing to the darkness at the time of the accident to the plaintiff's intestate, who, when walking along the bridge, was thrown to the street below and was killed; and that the defendant negligently failed to furnish suitable lights and safeguards upon the bridge and negligently caused its cars to be stopped on the bridge.

The further material allegations in the declaration were that the "plaintiff's intestate was a duly appointed and qualified officer of the watch and constable for criminal service in said Newburyport, doing his duty as such, and wearing his uniform; that on or about said date and in the night-time, the defendant, by its servants and agents, stopped one of its trains at or near its station in said Newburyport for the purpose of allowing persons rightfully to board its said train and alight therefrom, in such a manner and place as to cause the rear of said train to stand upon or beyond the aforesaid bridge of the defendant over said Merri-mac Street; that the plaintiff's intestate, acting as an officer and constable aforesaid, and in the performance of the duty delegated to him under the instructions of a superior officer, and upon information received by him, and upon his belief that criminals were escaping on said train from said Newburyport, and for the purpose of apprehending said criminals in the performance of his duty as said officer and constable, and for the purpose of examining certain persons abroad whom he had reason to suspect of an unlawful design, boarded said train and walked through one or more cars thereon toward the rear of said train and to or beyond the bridge aforesaid; that he found one of said suspected persons in said car; that, accompanied by said suspected person, the plaintiff's intestate then alighted and walked away from said train, toward said station upon said bridge; . . . that he was

rightfully upon said train under an implied invitation from the defendant; that said defendant had accepted as passengers on its said train during the night-time a person or persons whom the plaintiff's intestate had reason to suspect of some unlawful design."

The defendant demurred to the declaration. The Superior Court sustained the demurrer and gave judgment for the defendant; and the plaintiff appealed.

*J. T. Connolly & R. E. Burke*, for the plaintiff.

*H. F. Hurlburt & D. E. Hall*, for the defendant.

RUGG, J. It is to be noted that there is no allegation that the plaintiff's intestate entered the train for the purpose of serving a warrant for the arrest of any person whom he believed to be there, nor that he had any reasonable ground to believe that there was being committed upon the train any breach of the peace or other crime, which required him to enter for the purpose of preserving public order, nor that there were upon the train persons who had committed a felony or any of the misdemeanors for which under the statutes it is lawful for a constable to arrest without a warrant. See R. L. c. 11, § 223; c. 46, §§ 7, 13; c. 52, § 8; c. 57, § 93; c. 66, § 5; c. 75, § 128; c. 91, §§ 4, 123, 134; c. 100, § 86; c. 108, §§ 10, 17, 23; c. 111, § 260; c. 166, § 2; c. 204, § 20; c. 208, §§ 109, 121; c. 212, §§ 36, 46, 47, 53, 58, 60, 62, 74, 80; St. 1906, c. 403, amending R. L. c. 212, § 53; c. 214, §§ 2, 6.

The vital allegations are that, being informed and believing "that criminals were escaping on said train from said Newburyport," he went aboard for the purpose of "apprehending said criminals" and "examining certain persons abroad whom he had reason to suspect of an unlawful design." "Criminals" is a word of broad significance, and includes those who may have committed the most trifling infractions of a penal statute, as well as those guilty of the most heinous offences. It obviously describes a large number of persons, whom a constable would have no right to arrest without a warrant. The other statement of purpose, for which the entry upon the train was made, was to perform the duty required under R. L. c. 31, § 2, relating to watch and ward. The justification, which this statute might afford, reaches only to the watch in the examination of "all persons abroad

whom they have reason to suspect of an unlawful design." It has been strongly argued, in behalf of the defendant, that, in view of the history of this statute, it should be construed to apply only to those persons who are walking abroad. See statute passed October 19, 1652; 3 Mass. Col. Rec. 282; Prov. St. 1699-1700, c. 10; 1 Prov. Laws (State ed.) 381; St. 1796, c. 82; Rev. Sts. c. 17, § 4; Prov. St. 1712-18, c. 4; 1 Prov. Laws (State ed.) 699; Commissioners' Report, c. 28, § 4; *Pratt v. Street Commissioners*, 139 Mass. 559, 563.

Without passing upon this question, it is enough for the purposes of the present case to determine that one, who has become a passenger upon a steam railroad train and has placed himself in the carriage of the common carrier, cannot be said to be "abroad." Therefore, the constable was at most a mere licensee. The allegations of the declaration place him upon a quite different basis than was the plaintiff in *Parker v. Barnard*, 135 Mass. 116, where the police officer, in the execution of his duty, was injured by reason of a violation of statute on the part of the owner of the building. This case is also distinguishable from *Learoyd v. Godfrey*, 188 Mass. 815, where the police officer had been expressly invited upon the premises, and, in addition to the invitation, went for the purpose of suppressing a breach of the peace. The particular circumstances in *Gordon v. Cummings*, 152 Mass. 513, and *Finnegan v. Fall River Gas Works*, 159 Mass. 811, were such as to warrant the finding of an implied invitation on the part of the owner to enter the premises where the injuries were received. It is not alleged here that the defendant had failed to perform any statutory obligation incumbent upon it, which is a further fact distinguishing it from *Parker v. Barnard*, 135 Mass. 116. There was not even the implied invitation on the part of the defendant for the constable to enter the train, which might possibly be held to exist if a theft or other crime was being committed upon the train. Nor are the plaintiff's rights any stronger, if indeed they are as strong, as those of a fireman entering upon property for the purpose of protecting it from destruction. Yet it has been held in other jurisdictions that under such circumstances the person entering has only the rights of a licensee. See *Gibson v. Leonard*, 143 Ill. 182; *Beehler v. Daniels*, 18 R. I. 563; *Kohn v. Lovett*, 44 Ga. 251;

*Woods v. Miller*, 80 App. Div. (N. Y.) 232; *Woodruff v. Bowen*, 136 Ind. 431. The case made out by the declaration is somewhat like *Berry v. Boston Elevated Railway*, 188 Mass. 536, where the defendant was exonerated, the plaintiff having only the rights of a licensee. The defendant owed him no duty to keep its premises in a safe condition, and in such a case could not be held liable ordinarily, unless there was some recklessness or wanton misconduct on the part of itself or its servants. As was said by Mr. Justice Barker, in *Redigan v. Boston & Maine Railroad*, 155 Mass. 44, at page 47, "The general rule is, that a bare licensee has no cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk, and must take the premises as he finds them. . . . No duty is cast upon the owner to take care of the licensee, or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and cannot recover for injuries caused by obstructions or pitfalls." See *Cowan v. Kirby*, 180 Mass. 504; *Byrnes v. Boston & Maine Railroad*, 181 Mass. 322; *Griswold v. Boston & Maine Railroad*, 183 Mass. 434.

*Judgment affirmed.*

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GEORGE L. ALLEN, administrator *de bonis non*, with the will annexed, *vs.* CAROLINE E. BOARDMAN & others.

Essex. November 9, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Devise and Legacy. Words, "To share equally."*

A testator devised and bequeathed the residue of his estate "to the persons who at my decease are my heirs at law, such heirs at law to share the same equally." He left as his heirs at law a surviving sister, two nieces, who were the daughters of a deceased sister of the testator, and a grandnephew, who was the son of a deceased daughter of his deceased sister. The same persons would have been his heirs at law had he died at the date of his will. *Held*, that the distribution must be *per stirpes*, the testator's surviving sister receiving one half of the residue and each of the other three heirs receiving one sixth, the direction to share equally being given effect by applying it to the division between the classes of the testator's heirs.

APPEAL from a decree of the Probate Court for the county of Essex in a suit in equity brought by George L. Allen, administrator *de bonis non*, with the will annexed, of the estate of Charles H. Gould, late of Danvers, praying for instructions as to the distribution of the residue of the estate of that testator.

By his will the testator, after disposing by numerous bequests and devises of substantially all of his property, devised and bequeathed the residue of his property by the following clause of his will: "All the rest, residue and remainder of my property, real, personal, or mixed, to the persons who at my decease are my heirs at law, such heirs at law to share the same equally."

The only question was as to the meaning and intent of the testator under this clause of the will. The residue of the estate consisted of real and personal property.

The testator had, in his lifetime, two sisters, and at his decease left as his heirs at law an only surviving sister, Caroline E. Boardman, the appellant, and Mary E. Long and Caroline E. Denny, nieces, the daughters of his deceased sister Mary Ann Long, and Alanson L. Daniels, a grandnephew, the son of a deceased daughter of Mary Ann Long. The will was executed on December 30, 1898, and the testator died on October 13, 1900, and no change in the legal heirs or next of kin of the deceased took place between the date of the will and the decease of the testator.

The estate as inventoried amounted to \$137,111, exclusive of a piece of real estate in Danvers specifically devised which by mistake did not appear in the inventory.

The administrator *de bonis non* stated in his petition that the residue of the estate for distribution under the clause in question amounted to \$7,909.61. All the parties in interest appeared and filed answers.

The defendant Caroline E. Boardman alleged in her answer that the intention of the testator, under the terms of the will, was to give the residue of his estate to his heirs at law at his decease, determined by the statute of distribution, and that the residue should be divided into two equal parts between Caroline E. Boardman and the other heirs at law who were the descendants of her deceased sister, Mary Ann Long.



The answer of the defendants, Mary E. Long, Caroline E. Denny and Alanson L. Daniels, submitted their rights under the will to the decision of the Probate Court.

The judge of the Probate Court entered a decree ordering the administrator to distribute the rest and residue in the proportions of one fourth to each of the four heirs. The defendant Caroline E. Boardman appealed.

The appeal came on to be heard before *Hammond*, J., who reserved it for determination by the full court.

*J. M. Raymond*, (*H. E. Jackson* with him,) for Caroline E. Boardman.

*J. Smith, Jr.*, for Mary E. Long, Caroline E. Denny and Alanson L. Daniels.

RUGG, J. The testator, Charles H. Gould, after disposing in numerous bequests of a large part of his property, devised the residue in the following language: "All the rest, residue and remainder of my property, real, personal, or mixed, to the persons who at my decease are my heirs at law, such heirs at law to share the same equally." The testator had in his lifetime two sisters, and at his decease left as his heirs at law an only surviving sister, Caroline E. Boardman, two nieces, Mary E. Long and Caroline E. Denny, daughters of his deceased sister, and Alanson L. Daniels, a grandnephew, son of a deceased daughter of his deceased sister. The single question presented by the reservation is whether the remaining estate is to be distributed between these heirs at law *per capita* or *per stirpes*. No assistance as to the interpretation of the disputed clause can be derived from the other provisions of the will.

It is a well recognized rule of testamentary construction that a devise to heirs "designates not only the persons who are to take, but also the manner and proportions in which they are to take." *Daggett v. Slack*, 8 Met. 450. This rule must prevail here, unless the words of the testator, "such heirs at law to share the same equally," indicate that a different disposition was intended. Words of this general description in wills have frequently been interpreted. In *Holbrook v. Harrington*, 16 Gray, 102, the language of the testator was "to be equally divided between the heirs of my late husband and the heirs of my brothers and sisters"; in *Houghton v. Kendall*, 7 Allen, 72,

"to pay over to the children who may be the surviving heirs of said Susan's body, to be divided in equal shares among them"; in *Balcom v. Haynes*, 14 Allen, 204, the devise was, "to my brothers, A., B., and C., and my sisters, D. and E., and the heirs of F., to be divided in equal shares between them"; in *Bassett v. Granger*, 100 Mass. 848, the language was, "to the heirs of my late husband and to my heirs equally"; in *Rand v. Sanger*, 115 Mass. 124, "I give, devise and bequeath to be equally divided among those persons who shall be my legal heirs at the time of my decease"; in *King v. Savage*, 121 Mass. 308, the devise was for the benefit of four children of a sister of the testator during their lives, "and upon the decease of either of them, the principal of his or her share shall be equally divided among the heirs at law of such deceased person"; in *Hall v. Hall*, 140 Mass. 267, the property was "to be equally divided among all such issue or children, share and share alike"; in *Cummings v. Cummings*, 146 Mass. 501, the testator provided for a division "equally between my blood relations of the degree which the law permits"; in *Townsend v. Townsend*, 156 Mass. 454, the testator directed a distribution equally between the families of himself and his first wife and himself and his second wife; in *Siders v. Siders*, 169 Mass. 523, the testamentary phrase was "in equal shares by right of representation" to certain named nephews and nieces; and in *Coates v. Burton*, 191 Mass. 180, the bequest was "to her lawful issue share and share alike." In all these cases, although not in all the substantive ground of decision, the words of the testator were said to indicate the intention to make a stirpital distribution.

It is impossible to draw any line of distinction in principle between the language used in the case at bar and that passed upon in the adjudications we have referred to. It may well be that the testator phrased his residuary clause in view of some of these decided cases, and intended thereby that his property should be divided with an equal regard to the rights of all his heirs at law as defined by the statute of distribution, or that equality of division among his heirs which the law provides. The words "to share the same equally" may be given effect by being applied to the division between the classes of his heirs, and not to that between the four individuals who constituted all

his heirs at law. The administrator should be directed to distribute one half of the residue to the surviving sister, and one sixth each to the other three heirs.

*Decree of Probate Court reversed.*

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FIRST CONGREGATIONAL SOCIETY IN EAST LONGMEADOW  
vs. CHESLEY METCALF.

Hampden. November 12, 1906. — November 27, 1906.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Equity Jurisdiction*, To remove cloud from title. *Land Court. Superior Court. Supreme Judicial Court. Jurisdiction.*

The jurisdiction over suits in equity to remove a cloud from the title to land, mentioned in R. L. c. 182, §§ 6-10, was not transferred by St. 1904, c. 448, § 1, from the Superior Court to the Land Court, and such suits remain within the general equity jurisdiction of the Superior Court and the Supreme Judicial Court.

BILL IN EQUITY, filed in the Superior Court on January 4, 1906, to remove a cloud from the plaintiff's title to certain land in the town of East Longmeadow.

The case was heard by *Crosby, J.*, who found for the plaintiff, and made a decree granting the relief sought. The defendant appealed.

*C. S. Ballard*, for the defendant.

*J. L. Rice*, for the plaintiff.

KNOWLTON, C. J. This is a bill in equity brought to remove a cloud from a title. No objection has been made to its form or its averments, and the only question argued before us is whether the St. 1904, c. 448, § 1, transferring the jurisdiction of the Superior Court over real actions to the Land Court, includes such bills in equity.

Dealing with this question only, we are of opinion that the jurisdiction was not transferred, and that the decree for the plaintiff should be affirmed. This section includes proceedings of only four classes: first, writs of entry under the R. L. c. 179; second, petitions to require actions to try title to real estate

under R. L. c. 182, §§ 1 to 5; third, petitions to determine the validity of incumbrances under the R. L. c. 182, §§ 11 to 14, and fourth, petitions to discharge mortgages under the R. L. c. 182, § 15. The proceedings over which jurisdiction is transferred are those which are commenced under these statutes and no others. Suits in equity to quiet or establish the title to land, or to remove a cloud from the title, are not included in these chapters and sections, but are mentioned in R. L. c. 182, §§ 6 to 10. They therefore remain within the general equity jurisdiction of the Superior Court and the Supreme Judicial Court.

*Decree affirmed.*

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MICHAEL SMITH vs. PATRICK J. McQUILLIN.

Bristol. October 22, 1906. — December 10, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Bankruptcy*, Contingent claims. *Surety*. *Contract*, Implied: common counts.

In an action to recover money paid by the plaintiff as surety on the defendant's bond given in another action to dissolve an attachment, the defence relied upon was the defendant's discharge in bankruptcy. It appeared that the defendant went into bankruptcy and was discharged between the bringing of the action on the bond and the recovery of judgment, and that the plaintiff had no notice or actual knowledge of the bankruptcy proceedings. *Held*, that at the time of the adjudication in bankruptcy the plaintiff's claim was a contingent one and as such was not provable under the bankruptcy act of 1898, and so was not discharged. Following *Goding v. Rosenthal*, 180 Mass. 43.

CONTRACT for the amount paid by the plaintiff in satisfaction of a judgment obtained against him as surety on the defendant's bond given on January 30, 1899, to dissolve an attachment against the defendant. Writ dated September 22, 1904.

The case came on to be tried before Fox, J., the facts being undisputed and agreed to by the parties. Those which are material are stated in the opinion. The defendant relied in defence on his discharge in bankruptcy. His petition in bankruptcy was filed on November 26, 1902, and his discharge was granted

on April 14, 1903. The action against the plaintiff and another as sureties on the defendant's bond to dissolve the attachment was brought on January 2, 1902, and judgment was entered against the plaintiff on September 6, 1904. On September 20, 1904, the plaintiff satisfied that judgment by paying the amount of \$617.90. The plaintiff had no notice or actual knowledge of the bankruptcy proceedings.

The judge ordered a verdict for the plaintiff in the sum of \$668.37, and at the defendant's request reported the case for determination by this court, under an agreement of the parties that if the ordering of the verdict was affirmed judgment was to be entered thereon, and that otherwise judgment was to be entered for the defendant.

*A. N. Lincoln & A. H. Hood*, for the defendant.

*F. A. Pease*, for the plaintiff.

MORTON, J. The plaintiff was surety on a bond given by the defendant to dissolve an attachment. Judgment was recovered against the defendant in the action in which the attachment was made, and was satisfied in part by the defendant. Afterwards an action was brought on the bond by the judgment creditor against the present plaintiff and the other surety. In the action thus brought judgment was rendered against the present plaintiff, and on demand he paid and satisfied the judgment. Between the bringing of the action on the bond and the recovery of judgment the present defendant went into bankruptcy and was discharged. He sets up that discharge in defence of the present action. We have stated what we regard as the essential facts omitting the others. The questions are whether the plaintiff's claim was provable in bankruptcy and if so whether it was duly scheduled, it being found that the plaintiff had no notice or actual knowledge of the bankruptcy proceedings.

If the claim was not provable in bankruptcy it is immaterial whether it was properly scheduled or not, and therefore the first question is whether it was provable. There are strong reasons why the claim should be held to be provable. But in *Morgan v. Wordell*, 178 Mass. 350, it was assumed that contingent claims were not provable under the present bankruptcy act. That assumption has been followed since, (*Goding v. Rosenthal*, 180 Mass. 43, *Dunbar v. Dunbar*, 180 Mass. 170,) and we are

unable to distinguish this case from *Goding v. Rosenthal*, where a similar claim was held not to be provable. Therefore in accordance with the terms of the report the entry will be judgment on the verdict.

*So ordered.*

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PRESBURY C. CROMWELL vs. SUSAN F. NORTON.

Dukes County. October 22, 1906. — December 18, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND; BRALEY, & RUGG, JJ.

*Contract, Implied: common counts, Consideration. Frauds, Statute of. Trust, Oral concerning land. Evidence, Extrinsic affecting writings, Relevancy. Limitations, Statute of. Deed, Consideration.*

If one conveys land to another under an oral agreement which the other refuses to perform and cannot be compelled to perform on account of his setting up the statute of frauds, he who conveyed the land can recover its value from the grantee on the ground that the consideration for the conveyance has failed and he is entitled to be reimbursed.

In an action by a brother against his sister to recover the value of land which he conveyed to her by an absolute deed, he can be allowed to show by oral evidence that, being about to go to sea, he conveyed the land to the defendant so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted the land at any time she should reconvey it to him.

In an action by a brother against his sister to recover the value of land which he conveyed to her by an absolute deed, in which the defendant set up the statute of limitations, the plaintiff testified that twenty-four years before the action was brought, being about to go to sea, he conveyed the land to the defendant so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted the land at any time she should reconvey it to him, that he returned, but the fact that he had given the deed to the defendant escaped his attention until it was recalled to him by a transaction about two years before his action was brought, when he demanded a reconveyance of the land, which the defendant refused. It appeared that in the first year after the conveyance the defendant had sold a part of the land and had paid the proceeds to the plaintiff. She claimed the rest of the land as an absolute gift. *Held*, that the statute of limitations did not begin to run until there was a demand for a reconveyance and a refusal, that the fact that the defendant sold a part of the land and accounted to the plaintiff for the proceeds did not constitute a repudiation of the agreement as to the remaining land, and that it would have been wrong to comply with a request of the defendant to instruct the jury that if the agreement was as testified to by the plaintiff the sale constituted a violation of it and the right of action accrued then and was barred by the statute.

In an action by a brother against his sister to recover the value of land which he conveyed to her by an absolute deed, the plaintiff testified that twenty-four years before the action was brought, being about to go to sea, he conveyed the land to the defendant so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted the land at any time she should reconvey it to him, that he returned, but the fact that he had given the deed to the defendant escaped his attention until it was recalled to him by a transaction about two years before his action was brought, when he demanded a reconveyance of the land, which the defendant refused. The presiding judge excluded evidence offered by the defendant to show acts of friendliness and kindness on the part of the defendant toward the plaintiff and their amicable relations. It was conceded by the plaintiff that the relations between them were entirely friendly and amicable down to the time when the plaintiff demanded a reconveyance. *Held*, that the exclusion was right, the evidence offered having no tendency to show that there was a consideration for the deed.

MORTON, J. This is an action to recover the value of certain real estate conveyed by the plaintiff to the defendant. The case was tried partly on agreed facts and partly on oral testimony. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to certain rulings and refusals to rule in regard to certain matters of evidence, and in regard to the statute of frauds and the statute of limitations, both of which defences were set up in the answer.

The plaintiff's case was in substance this: In 1880, being about to go to sea, he conveyed the land in question to the defendant, who is his sister, so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted it at any time she should reconvey it to him. He returned, but the fact that he had given the deed of the land in question escaped his attention, as he testified, till it was recalled to him by her in 1902 in connection with another matter, when he demanded a reconveyance of the land, which she refused. The defendant contended that she was to sell a part of the land and pay over the proceeds, which she did in 1881, and that as to the rest, being the land in controversy, the conveyance was an absolute one, and she denied that there was any such agreement as alleged by the plaintiff. So far as the statute of frauds is concerned the case comes within the well settled principle that if one conveys to another land or other property pursuant to an oral agreement which such other party refuses to perform and cannot be compelled to perform because

within the statute, the value of the property so conveyed can be recovered by the party conveying it. *Kelley v. Thompson*, 181 Mass. 122. *Peabody v. Fellows*, 177 Mass. 290, 293. *Miller v. Roberts*, 169 Mass. 134, 145. *Holbrook v. Clapp*, 165 Mass. 563. *O'Grady v. O'Grady*, 162 Mass. 290. Recovery is allowed in such a case, not as an indirect way of enforcing the contract, which would be contrary to sound principles, but on the ground that the refusal of the defendant to perform constitutes a failure of consideration, and he is therefore bound to make the plaintiff whole for what he has got from him. If the defendant is ready to perform, the fact, that the contract is within the statute and he could set up the statute if he chose to, is immaterial. *Twomey v. Crowley*, 137 Mass. 184. So is the exact nature of the undertaking on the part of the party refusing to perform, — whether, for instance, it was to hold in trust or to reconvey. See *Twomey v. Crowley*, *ubi supra*. It follows that the oral testimony in regard to the agreement, to the admission of which the defendant objected, was rightly admitted, and that the ruling of the judge in regard to the statute of frauds was correct.\*

The statute of limitations did not begin to run until there was a demand for a reconveyance and a refusal, and the agreed facts show that that was not till 1902.† *Ryder v. Loomis*, 161 Mass. 161, 163. The fact that the defendant sold part of the property and accounted to the plaintiff for the proceeds did not constitute a repudiation of the agreement as to the remaining land, that in suit, and it would therefore have been wrong to instruct the jury as the defendant requested that if the agreement was as testified to by the plaintiff the sale constituted a violation of it, and the right of action accrued then and was barred by the statute. Full effect was given to the matter of the sale and accounting by the

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\* The objection of the defendant was, "that any agreement that was entered into between these parties to establish a trust on land, should be proven by the written instrument and not by oral evidence." The judge said: "This is not to enforce any agreement which otherwise would have to be in writing." The counsel for the defendant said: "That is true, but at the same time, this case is founded upon a trust, as it is set out in the declaration." The judge admitted the evidence. See R. L. c. 147, § 1.

† The action was begun by a bill in equity which was filed on February 8, 1904, and in April, 1905, was amended by leave of court into an action at law.



instructions of the court, which left it to the jury to draw such inferences therefrom as they might deem proper in determining what the agreement actually was.

The testimony that was offered by the defendant as to acts of friendliness and kindness on the part of the defendant towards the plaintiff, and of their amicable relations, was rightly excluded. It had no tendency to show that there was a consideration for the deed, and it was conceded by the plaintiff that the relations between them were entirely friendly and amicable down to 1902, when the plaintiff demanded a reconveyance.

We see no error in the rulings or refusals to rule or in the instructions to the jury.

*Exceptions overruled.*

*B. T. Hillman*, for the defendant.

*W. A. Morse*, for the plaintiff.

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### EVERETT C. MORSE vs. WILLIAM C. ASHLEY & others.

Bristol. October 23, 1906. — December 27, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*School and School Committee. Evidence, Presumptions and burden of proof.  
Municipal Corporations.*

On the trial of a petition for a writ of mandamus to compel the school committee of a town to reopen a certain school, if the respondents in their answer aver that in their judgment the interests of the pupils who formerly attended the school closed by the committee required that they should be transferred to other schools affording greater facilities for education, and that the number of pupils attending the school closed by the committee was so small as in the judgment of the committee to render its maintenance inadvisable and unnecessary, it will be assumed, in the absence of any evidence to the contrary, that the respondents acted in good faith and that their judgment was correct.

Under R. L. c. 42, § 27, which gives to the school committee of a town "the general charge and superintendence of all the public schools," the committee in the performance of this duty act as public officers and not as the agents of the town, and a vote of a town to reopen a certain school, which would operate and is intended to operate to take pupils from schools to which they have been assigned by the school committee and transfer them to the reopened school, is not binding on the committee.

HAMMOND, J. This is a petition for a writ of mandamus \* to compel the respondents as they are the school committee of the town of Acushnet, to reopen the Bisbee School in that town. On October 7, 1905, the town voted to reopen the school, but the respondents refuse to comply with the vote. The question is whether the vote is binding upon the respondents.

It appears that at some time previous to the vote there had been maintained in the town an ungraded school called the Bisbee School, which two children of the petitioner, each under ten years of age, attended; that the committee had caused the school to be closed, "and thereafter the said children of petitioner were required, by order of said committee, to attend the graded school, located three quarters of a mile distant from said 'Bisbee School,' and called the 'Long Plain School,' and for a few days they attended the latter school, the committee then and now furnishing transportation to and from said school." It further appeared that the number of pupils in the Bisbee School was small, their ages varying from four years to fourteen years, and that it was about half a mile from the petitioner's residence.

It also appeared that there are no school districts in the town, the attendance of the pupils at the several schools being regulated by the respondents; that at the time of the vote the town maintained, in addition to the Bisbee school house, "a sufficient number of school houses, properly furnished, . . . in which houses schools were and are now maintained, to accommodate the total number of children who might legally attend the public schools therein, except that no high school is maintained"; and that "such schools are under the direction of a superintendent employed by said town in conjunction with two other adjoining towns."

The respondents in their answer aver that in their judgment the interests of the pupils who attended the Bisbee School required that "they should be furnished the greater and systematized facilities for education which the . . . [Long Plain School] . . . offered in preference to reopening the . . . Bisbee School and required the attendance of said pupils" at the graded school; and that the number of pupils formerly attending the Bisbee

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\* Reserved by *Lathrop, J.* for determination by the full court.

School is so small "as in the judgment of the . . . [respondents] . . . to render its maintenance inadvisable and unnecessary." In the absence of any evidence to the contrary it is to be assumed that the respondents are acting in good faith and that their judgment is correct.

The vote of the town was that "the town reopen the 'Bisbee School.'" It is well to see what under the circumstances was the meaning of this vote. It was not a vote to establish a high school or an evening and industrial school, nor simply to open the school house where the Bisbee School had been maintained. On the contrary it was an order that the pupils who formerly attended that school, or who under the previous custom naturally would have been assigned to it if it had not been closed, should be taken from the schools to which they had been respectively assigned by the respondents and sent to the old school, and there kept during the ordinary school hours. That is what the vote meant. If this order is valid, then the town may make a similar order as to every school house and every pupil, and transfer the pupils from school to school at its own will.

R. L. c. 42, § 27, provides that the school committee "shall have the general charge and superintendence of all the public schools." In the performance of this duty the committee act not as the agents of the town, but as public officers entrusted with certain powers and charged with corresponding duties. In the absence of the school district system the duty of assigning the pupils to the various schools is a part of the superintendence under this provision of the statute. This duty rests upon the committee; and of course upon them rests also the responsibility for the proper discharge of it. While they may and should take into careful consideration any wish of the inhabitants of the town, whether expressed in a formal vote or otherwise, still in the end their own decision when reached is the decision of the Commonwealth, and is to control. To hold otherwise would be to put the superintendence of the school into the hands of two separate bodies, one the town and the other the school committee, each being likely to neutralize the good effect of the work of the other, and thus to create confusion and inefficiency in the school system. It is manifest that by the vote under consideration the town undertook to direct the committee in a matter over which

the committee under the statute had full control. It follows that the vote is inoperative and is in no way binding upon the committee.

*Petition denied.*

*D. T. Devoll*, for the petitioner.

*J. L. Gillingham*, for the respondents.

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DAVID W. TEMPLE vs. GEORGE L. PHELPS.

Berkshire. October 17, 1906. — December 31, 1906.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Evidence*, Presumptions and burden of proof, Communications between attorney and client, Testimony at former trial. *Attorney at Law*. *Mortgage*, Foreclosure. *Real Action*.

Where the case of a plaintiff or demandant depends on proving the breach of the condition of a mortgage by a failure to make payments of money as required by its terms, the burden is on the plaintiff to prove the breach by showing that the payments were not made. Expressions in some of the earlier cases disapproved.

In the trial of a writ of entry where the demandant claims title as the purchaser of the land at a foreclosure sale, and the condition of the mortgage was that the tenant, who was the mortgagor, should pay \$70 to his mother in each year during her life, and the tenant relies on the defence that the foreclosure sale was void because there had been no breach of the condition of the mortgage, the burden is on the plaintiff to show that the required annual payments were not made.

Where the case of a plaintiff or demandant depends on proving the breach of the condition of a mortgage of real estate by a failure to make payments of money as required by its terms, whether the production of the mortgage by the plaintiff or demandant is even *prima facie* evidence that the payments have not been made, *quaere*.

The exclusion of confidential communications between an attorney and his client does not extend to a statement made by the attorney to his client of what a witness at a hearing before a master testified to in a matter affecting the client's interests.

In the trial of a writ of entry where the demandant claimed title as the purchaser of the land at a foreclosure sale, and the condition of the mortgage was that the tenant, who was the mortgagor, should pay a certain sum of money to his mother in each year during her life, and the tenant relied on the defence that the foreclosure sale was void because the condition of the mortgage was performed by him, the tenant put in evidence four receipts signed by his mother, who had died before the trial, to show payments of the sums due under the mortgage.

The demandant called as a witness an attorney at law, who had acted for the tenant in another case in which there had been a hearing before a master, and who testified that the tenant's mother testified before the master in that case that she had not been paid the sums due under the mortgage and that the receipts signed by her were fictitious and she had signed them when they were sent to her by her son in order to relieve his mind when he was ill and there was trouble about the mortgage. The witness further testified against the objection of the tenant, that he afterwards had told the tenant what his mother had testified to before the master. The tenant contended that this was a confidential communication between an attorney and his client and so was admitted improperly. *Held*, that the evidence was admitted properly, the statements made by the attorney to his client being a narration of facts testified to at a public hearing and there being nothing private or confidential about the communication. *Semble*, that the stenographic report of the testimony of a witness at a former trial of the same case who since that trial has become insane will be received in evidence, when the testimony is material to the issues on trial.

**WRIT OF ENTRY**, dated February 11, 1903, to recover certain lands in Williamstown claimed by the plaintiff as purchaser at a foreclosure sale upon alleged default in the performance of the condition of a mortgage given by the tenant to one Mary E. Phelps, the tenant's mother.

In the Superior Court the case was tried before *Hitchcock, J.* The tenant had filed a plea setting forth several defences but before going to trial the parties entered into the following agreement: "It is agreed that all defences in this action are waived except the one issue raised in the second specification of the defendant's answer, namely: Whether at the time of the foreclosure of the mortgage given by George L. Phelps to Mary E. Phelps, there was a breach of the condition of the mortgage." Upon this agreement and the issue thus raised the case was tried and submitted to the jury.

The demandant offered in evidence the mortgage from the tenant to Mary E. Phelps, and the deed under the power of sale contained in the mortgage. The mortgage deed was dated August 27, 1888, was in the usual form of power of sale mortgages and was given to secure the payment of \$70 to Mary E. Phelps, each and every year during the term of her natural life.

This mortgage passed to the demandant by virtue of a decree of the Superior Court at the July sitting in Franklin County in 1895, and was foreclosed on February 17, 1896, by a sale of the premises to the demandant.

The contention of the tenant was that at the time of the fore-

closure there had been no breach of any of the conditions of the mortgage, and he introduced evidence upon this issue, a part of which consisted of four receipts given by Mary E. Phelps to the tenant before the foreclosure and while she still was the holder and owner of the mortgage. The contention of the demandant was that these receipts were without consideration and were but a subterfuge and were not given on the days they were dated.

The tenant introduced in evidence an affidavit made by Mary E. Phelps, dated April 5, 1902, in which among other things she stated that nothing was due on the mortgage at the time of the foreclosure, and also offered evidence of other statements made by Mary E. Phelps, which tended to show there was nothing due on the mortgage at the time of the foreclosure.

It was agreed that Mary E. Phelps died in 1902. The demandant called as a witness Charles E. Hibbard, who testified that he was an attorney at law and at one time was acting for the tenant in another action. The witness said that he was present as counsel for the tenant at the first hearing before H. C. Joyner, Esquire, the master in that case, at which the four receipts above mentioned were produced and placed in evidence by the tenant; that a second hearing of the case was held possibly a year after the first, at which Mary E. Phelps was present and testified that while her son George [the tenant] was sick in the hospital her son Gersham brought to her four papers which he desired her to copy and that the four receipts already referred to were the ones that she made at that time at his request; she said that all four receipts were made by her at one time.

The witness then testified as follows under objection and exception: "Q. Did the old lady make any statement in her testimony before Mr. Joyner as to the conversation with reference to these four papers that was had between herself and Gersham? A. She stated that Gersham asked her to copy and sign these four papers that George might have his mind relieved; that he was in the hospital and there was some trouble over the mortgage and that if he could have these four papers that it would relieve his mind from anxiety and that she told him it was not right, or words to that effect, to do so, but she did it. — Q. Did she tes-

tify before Joyner with reference to any statements she made to Gersham as to what she would do in case this matter came into court? A. She said she told George, I am not sure whether she testified she told Gersham, that she should tell the truth about it if they came into court, but she said that subsequently she went to the hospital to see George and then demanded back these receipts and he refused to give them to her and she told him that it was not right and that if she was ever called into court she should tell the truth, but I wouldn't say she told Gersham at the time she signed them although I have the impression that she did say the same thing to Gersham. But she did testify that she told that to George at the hospital."

The witness testified that Mary E. Phelps also testified that all she had ever received from George either in money or produce was approximately \$75. The witness further was permitted to testify subject to the objection and exception of the tenant as follows:

"Q. Did you state to George (the tenant) that his mother had testified? A. I repeatedly told Mr. Phelps just what his mother testified to and I think he came to my office the day following, might have been the afternoon of the hearing. — Q. Was there anybody else present at the time of this first interview you had with Phelps after this hearing? A. I wouldn't be able to state that. — Q. After that time did you have any further conversation with Phelps with reference to this testimony of his mother? A. Why, I can only repeat the answer which I gave you before, that I repeatedly told him what his mother had testified to and discussed the matter with him."

In the course of the trial the tenant offered in evidence a stenographic copy of the testimony of one Lucy Phelps, taken at a former trial of this action, who it was agreed was insane and in the Northampton Insane Asylum. The testimony was excluded subject to the exception of the tenant.

The judge in charging the jury gave the instructions in regard to the burden of proof which are quoted and described in the second paragraph of the opinion, the tenant excepting to this portion of the charge.

The jury returned a verdict for the demandant; and the tenant alleged exceptions.

*C. P. Niles*, for the tenant.

*J. F. Noxon & M. L. Eisner*, for the demandant.

KNOWLTON, C. J. This is a real action in which the demandant seeks to establish a title to certain land. He acquired the title through a foreclosure of a mortgage under a power of sale. By agreement of the parties the case was tried before a jury on the single issue, "Whether at the time of the foreclosure of the mortgage given by George L. Phelps to Mary E. Phelps, there was a breach of the condition of the mortgage." This instrument "was dated August 27, 1888, and was in the usual form of power of sale mortgages and was given to secure the payment of seventy dollars to the said Mary E. Phelps, each and every year during the term of her natural life." It was foreclosed by a sale of the premises on February 17, 1896.

An important question arises on the charge of the judge in regard to the burden of proof. He said to the jury: "When the defendant comes in and says that he has paid, or, as in this case, when he comes in and says that he has complied with certain conditions, the compliance of which would prevent the plaintiff from maintaining his action the burden of proof shifts over on to the defendant to establish that particular proposition." He further instructed them that if the tenant satisfied them by a fair preponderance of the evidence that his mother, the mortgagee, had been paid in full all that was due her under the mortgage up to the time of the foreclosure, there was no breach of the condition, and the foreclosure would be void, and the tenant would be entitled to a verdict. But if the tenant failed to satisfy them of that fact, then there was a breach of the condition, and the demandant would be entitled to a verdict. To this part of the charge the tenant excepted.

It is clear that, to establish his title, the burden of proof was on the demandant to show that there was a breach of the condition of the mortgage at the time of the foreclosure; otherwise the attempted foreclosure would be of no effect. *Rogers v. Barnes*, 169 Mass. 179, 184. *Burke v. Burke*, 170 Mass. 499. *New England Ins. Co. v. Wing*, 191 Mass. 192. Strictly and technically this burden did not shift during the trial, even if evidence was introduced which made a *prima facie* case in favor of the demandant. But when a *prima facie* case is made in favor



of a party at a trial, he is entitled to recover unless affirmative evidence is introduced to meet this *prima facie* case. Where the evidence relied on to meet the *prima facie* case is an independent fact which, if established, controls the case, and, if not established, is of no effect, the result is practically the same as if the original burden of proof changed. Unless the particular fact is established, the *prima facie* case prevails. It fairly may be said, therefore, that the burden is upon the party relying upon the particular fact to prove it. When existing overdue indebtedness is shown a cause of action is proved, and a subsequent payment in discharge of it is a particular fact in avoidance, which must be pleaded and proved in order to meet the claim of liability. In such a case it may well be held that the burden of proof is on the defendant; but if the question is whether there was a failure to pay a debt when it became due, the burden of proof is on the plaintiff who claims the money. If he produces a promissory note, or other evidence of indebtedness, which ordinarily would be given up if paid at maturity, he thereby makes a *prima facie* case which entitles him to recover unless something is shown to meet it. If evidence is introduced tending to show payment at maturity and this is the only defence, the question logically would seem to be whether, on the whole evidence, the plaintiff shows that the debt remained unpaid after it became due, so that a cause of action accrued.

Where an action is founded upon an alleged breach of a bond or recognizance given to secure the performance of an act, it is distinctly held that the burden of proof is on the plaintiff to show a failure to perform. *Blake v. Mahan*, 2 Allen, 75. *Toll v. Merriam*, 11 Allen, 395. *Thornton v. Adams*, 11 Gray, 391. In the last of these cases the court declined to express an opinion as to whether the rule in regard to the burden of proof would be the same if the instrument was a bond or a mortgage given to secure the payment of money. In principle there is no logical distinction, as to how far the plaintiff should go to show a liability, between a case where the breach consists of a failure to pay a sum of money and one where the breach is a failure to perform any other act. We think it plain that in an action of contract founded on an alleged breach of the condition of a bond to pay money, or of a mortgage to secure the payment of

money, the burden of proof is upon the plaintiff who alleges the breach.

In the case last cited it is said, although the remark is not involved in the decision, that the production of such a bond, like the production of an overdue promissory note, would be *prima facie* evidence of non-fulfilment of the contract. We doubt the correctness of this statement. A bond or mortgage to secure the payment of money is not usually given up by the holder on the performance of the condition. A mortgage is commonly recorded, and possession of the original instrument, either before or after its maturity, is not usually regarded as very important.

In the present case it does not appear whether the mortgage was put in evidence otherwise than by the record of it, or where it was at the time of the foreclosure, or afterwards, nor does it appear whether any note was given, or other promise to pay besides the statement in the condition of the mortgage. It is only in case the failure to pay according to the terms of the mortgage is established by the plaintiff, or *prima facie* evidence of it is introduced, the effect of which he seeks to avoid by proof of a subsequent payment, that the burden is on the defendant to establish the payment.

The contract with a condition, in *Gray v. Gardner*, 17 Mass. 188, was treated by the court as different from a bond or recognizance, in regard to the burden of proof. Unless there is such a difference, the decision is inconsistent with *Blake v. Mahan*, 2 Allen, 75, *Toll v. Merriam*, 11 Allen, 395, and *Thornton v. Adams*, 11 Gray, 891. If there is not such a difference, these cases should be treated as overruling the earlier one. The *per curiam* opinion in *McGregory v. Prescott*, 5 Cush. 67, contains language at variance with the true rule, when the only question is whether there was a failure to pay at maturity. The facts stated show that the decision of the case was correct. This language is made the foundation of a similar statement in *Jewett v. Draper*, 6 Allen, 484, which is also objectionable. See 16 Encyc. of Pl. & Pr. 167, 170, 172, 178, and cases cited in the notes. We are of opinion that the instructions upon the burden of proof in the present case were inaccurate.

The tenant excepted to the admission of the testimony of Mr. Hibbard as to what he told the tenant in regard to the testimony

of his mother, at a hearing before a master, at which the tenant was not present. This was objected to as a confidential communication between an attorney and his client. We are of opinion that the evidence was properly admitted, and that there was nothing of a private or confidential nature in it. In *Foster v. Hall*, 12 Pick, 89, 98, 99, the court says: "The privilege does not extend to matters not communicated by his client as confidential, but facts known of his own knowledge; . . . and so of other collateral facts, not confidentially communicated." See *Hatton v. Robinson*, 14 Pick. 416, 422; *Day v. Moore*, 13 Gray, 522; *Commonwealth v. Bacon*, 135 Mass. 521; *Brandt v. Klein*, 17 Johns. 335; *Lavers v. Van Buskirk*, 4 Penn. St. 309, 316; *Hager v. Shindler*, 29 Cal. 47; *Alden v. Goddard*, 73 Maine, 345, 348; *Snow v. Gould*, 74 Maine, 540, 543; *Aultman v. Ritter*, 81 Wis. 395, 398. All the statements made by Mr. Hibbard to his client were of facts testified to in a public hearing, and no testimony was given of anything of a confidential nature said by either of them.

The bill of exceptions does not show that the stenographic copy of the testimony of Lucy Phelps, taken at a former trial, contained anything material to the present case. The exception to the ruling must be overruled because it does not appear that the tenant was injured by it. If, upon another trial, it should appear that the testimony is material, we are of opinion that it should be received. In most courts such evidence is admitted. See 1 Greenl. Ev. (16th ed.) § 163 g; Wigmore, Ev. § 1408. See also *Le Baron v. Crombie*, 14 Mass. 234; *Holbrook v. Gay*, 6 Cush. 215; *Commonwealth v. McKenna*, 158 Mass. 207.

*Exceptions sustained.*

ANNIE E. WILLIAMS vs. OLD COLONY STREET RAILWAY  
COMPANY.

Bristol. October 23, 1906. — December 31, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Statute, Construction. Brockton Street Railway Company. Old Colony Street Railway Company. Words, "Wherein."*

In the construction of statutes it is a general rule that a limiting or qualifying word must be confined to the last antecedent unless the subject matter requires a different construction.

In the provision of § 8 of St. 1901, c. 214, extending the corporate powers of the Brockton Street Railway Company, to which the Old Colony Street Railway Company has succeeded, that "Said company may, for all purposes necessary or incident to the construction, maintenance and operation of an electric street railway, generate, manufacture, use and transmit electricity in any city or town wherein it is now or may hereafter be entitled to operate a street railway, and for that purpose may erect and maintain poles, trolley, feed and stay wires and other devices for conducting electricity in, over and under any streets, highways, bridges and town ways in any of said cities and towns wherein it has been or may hereafter be authorized by the board of aldermen or selectmen to operate its railway," the word "wherein," as last used, refers to "cities and towns" and not to "streets, highways, bridges and town ways," and the corporation has power to maintain poles and wires for the transmission of electricity for its corporate purposes in streets through which it is not authorized to operate its railway.

BILL IN EQUITY, inserted in a common law writ dated May 10, 1905, to restrain the defendant from entering the plaintiff's premises on Bryant Street in Taunton and from cutting trees and otherwise injuring the property of the plaintiff, and to compel the defendant to remove from the plaintiff's property all poles and wires there erected and maintained by it.

In the Superior Court the case was heard by *Holmes, J.*, who by agreement of the parties reserved and reported it for determination by this court.

The report was as follows:

The plaintiff is seised in fee simple of a piece of land described in her deed as "a certain lot of land with the buildings thereon situate in said Taunton on the southwesterly side of High Street," describing a lot on the corner of Bryant Street and High Street in that city.

The defendant legally operates an electric street railway in several public streets in Taunton, but has not and never has had a street railway track in Bryant Street, and no location for a track in Bryant Street has ever been granted to the defendant or to any other person or corporation. There are no poles or wires in that street except those maintained by the defendant as hereinafter set forth.

In the summer of the year of 1904 the defendant built a new power house or sub-station on High Street in Taunton, near the plaintiff's estate. In October of the same year, upon the petition of the defendant, the board of aldermen of the city of Taunton without notice to the plaintiff and without public hearing granted to the defendant permission to erect poles in Bryant Street, including those complained of in this suit, and to attach wires and other fixtures thereto. Since the granting of that petition the defendant has erected several poles in Bryant Street, two of which stand in the portion of that street adjacent to the plaintiff's premises, and has attached cross arms and wires thereto. These wires, which are known as "feed wires," measure about one and one quarter inches in diameter and are seven in number. The poles, cross arms and wires are used by the defendant for the transmission of electricity for purposes necessary or incident to the operation of its street railway, being its main and only line of feed wires for the transmission of electricity from its sub-station on High Street to its railway to Providence, Fall River, Brockton and other points, and being the shortest and best route through public ways for such transmission between that sub-station and the railway. They extend from the sub-station of the defendant on High Street through Bryant Street and Sumner Street to the defendant's track on Weir Street. The defendant has succeeded to all the rights and privileges of the Brockton Street Railway Company. Maps were annexed to the report showing the plaintiff's premises, the locations of the poles in the portion of Bryant Street adjacent to the plaintiff's premises, the location of the defendant's power house or sub-station and those of such of its tracks and lines as were material to the case.

If the plaintiff was entitled to relief in equity on the facts above stated a decree for the plaintiff requiring the removal of

the poles, cross arms and wires upon the portion of the street adjacent to her premises was to be entered; otherwise, a decree dismissing the bill was to be made.

*A. Fuller*, for the plaintiff.

*E. W. Burdett*, (*J. H. Knight* with him,) for the defendant.

KNOWLTON, C. J. This is a bill in equity brought to restrain the defendant from maintaining poles and wires in one of the streets of the city of Taunton, and to compel the removal of the poles and wires which have been erected there by the defendant. The principal question in the case relates to the construction of the St. 1901, c. 214, § 8. This statute is entitled "An Act to extend the corporate powers of the Brockton Street Railway Company." By c. 434 of the acts of the same year, the name of this corporation is changed to Old Colony Street Railway Company, so that the defendant is the corporation mentioned in the earlier statute. The language in question is as follows: "Said company may, for all purposes necessary or incident to the construction, maintenance and operation of an electric street railway, generate, manufacture, use and transmit electricity in any city or town wherein it is now or may hereafter be entitled to operate a street railway, and for that purpose may erect and maintain poles, trolley, feed and stay wires and other devices for conducting electricity in, over and under any streets, highways, bridges and town ways in any of said cities and towns wherein it has been or may hereafter be authorized by the board of aldermen or selectmen to operate its railway, and upon and over any private land, with the consent of the owners thereof," etc. The street to which the suit refers is not one in which the defendant is authorized by the board of aldermen to operate its railway, although authority was given by the board to erect and maintain the wires for the transmission of electricity through it.

The plaintiff contends that the word "wherein" in the clause "wherein it has been or may hereafter be authorized by the board of aldermen or selectmen to operate its railway," relates to "streets, highways, bridges and town ways"; while the defendant contends that it relates to the words "in any of said cities and towns." It is a general rule that a limiting or qualifying word or clause must be confined to the last antecedent,

unless the subject matter requires a different construction. *Cushing v. Worrick*, 9 Gray, 382. *Commonwealth v. Kelley*, 177 Mass. 221. *Fowler v. Tuttle*, 24 N. H. 9. *Gaither v. Green*, 40 La. Ann. 362. In the clause giving the general authority in the first part of the section, the word "wherein" plainly relates to the words, "any city or town," and includes all parts of such cities and towns. The statement of the more specific authority is introduced by the words, "and for that purpose may erect," etc. These words do not indicate a limitation of the general authority, but a more particular definition of it. The word "wherein" is not the word which naturally would be chosen to relate to bridges over or upon which a railway was operated, while it is strictly accurate as referring to a city or town in which the operation of a railway is authorized. The words, "in any of said cities and towns" are not the best that could be chosen, for no cities or towns had been mentioned to which the word "said" properly could be applied. But we think it obvious that the expression is intended to include cities and towns such as previously had been referred to in the same sentence, and that its meaning is the same as if the words were "in any city or town." If the plaintiff's construction were adopted, the greater part of this section would be meaningless, for under previous statutes the corporation was authorized to erect and maintain poles, trolley, feed and stay wires and other devices for conducting electricity in, over and under any streets, highways, bridges and town ways through or over which it was authorized by the board of aldermen or selectmen to operate its railway. See definitions of the words "street railway" and "location," R. L. c. 111, § 1; St. 1906, c. 468, Part III. § 1. This provision would not have been enacted if it were not designed to add something to existing rights.

The principal argument against the defendant's construction is that the Legislature could not have intended to give the corporation so much power. In answer to this it is shown that, in the same year, by the Sts. 1901, cc. 280, 305, 316, 317, 318 and 348, authority of this kind was given to six other corporations in the same language as in the statute before us, except that the words "in any city or town wherein" are used instead of the words "any of said cities or towns wherein." In these statutes

the meaning seems too plain for serious question. Again, the same authority is given to another corporation by the St. 1903, c. 284, in similar language, in such form that there is no ambiguity or doubt in regard to the meaning in this particular. The fact, that by the St. 1901, cc. 347, 350, the same authority is limited by unmistakable language to streets, highways, bridges and town ways on which the corporation mentioned has authority to operate its railway, makes more plain the distinction between the two classes of statutes, and shows that the defendant's construction of c. 214 is correct.

It is unnecessary to consider whether the plaintiff has such an interest in the land under the street as would give her a standing in this suit if her construction of the statute were adopted.

*Bill dismissed.*

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**FANNY SHULTZ vs. OLD COLONY STREET RAILWAY  
COMPANY.**

Bristol. October 23, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

*Negligence, Imputed.*

11 one, while being driven in a carriage as a guest of the person driving, is injured by a collision on a public way caused directly by the negligence of a third person, to which negligence on the part of the driver contributed, he may recover against the negligent third person in spite of the negligence of the driver if personally he was in the exercise of all the care which ordinary caution requires.

If one has accepted an invitation of a friend to be driven by him in his carriage and in entering the vehicle and continuing in it has acted with reasonable caution, having no ground to suspect incompetency or to anticipate negligence on the part of the driver, and while so being driven is injured by a collision on a public way caused directly by the negligence of a third person, which would not have happened unless the driver also had been negligent, and if the impending danger was so sudden or of such a character as not to require or permit any act for his own protection, the guest may recover from the negligent third person for his injuries.

TORT for personal injuries caused by the collision of an electric car of the defendant with a carriage in which the plaintiff was being driven. Writ dated February 3, 1903.



At the trial in the Superior Court before *Hitchcock*, J. there was evidence introduced by the plaintiff tending to show that the plaintiff was being driven in a carriage by a friend, one Barenbaum, on Pleasant Street in the city of Fall River; that Barenbaum owned the horse and carriage and "was giving her a ride to her home"; that the plaintiff in no way interfered with Barenbaum's driving, in no manner controlled him or directed how he should drive, but left the driving to him; that the carriage was within the tracks of the defendant's railway and was going toward the city; that the car of the defendant was running behind it and without any warning ran into the hind wheels of the carriage as the carriage was leaving the tracks.

The evidence offered by the defendant tended to show that the carriage was being driven along the right hand side of the street out of the tracks, and then was turned across the tracks suddenly, and the car and the hind wheel of the wagon came in collision. The plaintiff offered evidence to show that, even if the carriage had been turned from the right hand side of the street suddenly across the tracks, still the horse was moving so slowly and the car was moving so rapidly that, before the horse and the forward wheels of the wagon were brought across, the motorman could have stopped the car before he travelled the distance required to reach the hind wheels of the wagon, and that he was negligent because he did not do so. This was contradicted by the defendant's evidence.

Upon this evidence the plaintiff asked the judge to rule:

1. That, if the plaintiff was not negligent in riding in the carriage and if the plaintiff in no way controlled the driver or directed the manner in which he should drive, then the plaintiff can recover if the defendant's motorman was negligent and if his negligence in any way contributed to the collision, and the fact that the driver of the carriage in which the plaintiff sat might also have been negligent is immaterial.

2. That, if at the time of this accident the plaintiff was in the exercise of due care and the defendant's motorman was not, the verdict must be for the plaintiff.

The judge refused to rule as requested, but instructed the jury on these points as follows:

"In this case, as in other tort cases which you have had, the

burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence, first, that she was in the exercise of due care; second, that the defendant, by its motorman or conductor or whoever was in charge of the car, was negligent; and, third, that the injuries that she complained of were received and were the result of the accident that happened and were the result of the negligence and carelessness of the defendant, and that she herself did not contribute towards the injuries which she claims to have received.

"The first question is, Was the plaintiff herself in the exercise of due care? She claims that she was riding in this buggy or carriage, which was being driven by a man of her acquaintance, over whom she exercised no control, and gave no directions as to the way in which he should drive the carriage; she trusted herself evidently to him; and that brings up an important question which enters into the question of her due care, and that is the question of the due care or carelessness of the driver of the team; for riding as she claims to have ridden, the driver of the team is the one whose conduct is to be inquired into, as to whether he was careful or careless in driving that team. If he was careless in driving it, and if his carelessness contributed to the injury which the plaintiff claims to have received, then the plaintiff is bound by his carelessness and would not be entitled to recover. If he was careful in driving and she was careful on her part, then of course the question of due care on the part of the plaintiff would be sustained."

After discussing the question whether the carriage was being driven negligently, the judge said:

"Of course if you should find that the plaintiff was not in the exercise of due care, or this person who was driving the buggy was not in the exercise of due care, why the plaintiff cannot recover. The plaintiff has not sustained the burden of proof upon the first proposition."

The plaintiff took no exception, except to the refusal of the judge to give the above rulings requested by her, and to the paragraph of the charge last quoted above, and also to the rest of the charge wherein it was inconsistent with the rulings requested. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*D. R. Radovsky*, for the plaintiff.

*J. M. Swift*, for the defendant.

RUGG, J. This case fairly raises the question as to whether the negligence of the driver of a vehicle is to be imputed to a guest, riding with him gratuitously and personally in the exercise of all the care, which ordinary caution requires. The first case in our own court, which occasioned any discussion as to the identification of a passenger with a driver, was *Allyn v. Boston & Albany Railroad*, 105 Mass. 77. The injuries out of which that action grew were received at a crossing at grade of a highway and steam railroad. The plaintiff personally failed to exercise any care for his own safety at a place so well recognized as one of danger, and sought to recover by screening himself behind the due care of the driver. The court says respecting this contention: "If the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that Haskell was in the exercise of due care, not only in the management of his horse, but in using the necessary precautions to guard against danger from passing trains."

The subject was next before the court in *Randolph v. O'Riordon*, 155 Mass. 331. Here one of the plaintiffs hired a hack of one of the defendants for the purpose of attending a funeral, and exercised no control over the actions of the driver of the carriage other than the purpose of hiring indicated. The injury occurred by reason of the negligence of the driver of the hack, in which the plaintiffs were riding, and the concurring negligence of the driver of another carriage. After repudiating the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, and referring with approval to *Little v. Hackett*, 116 U. S. 366, 375, and quoting from *Allyn v. Boston & Albany Railroad* the sentence above quoted, the court proceeds: "This was very different from saying that Haskell's negligence was to be imputed to the plaintiff, if he had been a passenger in a hack of which Haskell was the driver. It was merely saying that if, in a dangerous place, one person trusted another person to look out for him, he must show that such person used due care."

In *Murray v. Boston Ice Co.* 180 Mass. 165, the lower court was asked to rule "That if the accident was not due to the negligence of the defendant's driver alone but was due partly also

to the negligence of the plaintiff's driver, Marshallen, he could not recover." This was refused, but it was ruled that if the plaintiff "trusted to Marshallen the sole care and management of the team 'in which they were riding, and relied solely on the care and vigilance of Marshallen,' then he must show due care on Marshallen's part." This instruction was held correct. And it was further said that the court did not mean to give the *Allyn* case "any further sanction than it now has."

*Yarnold v. Bowers*, 186 Mass. 396, was a case of collision at night upon a small lake between an unlighted rowboat not pursuing any regular course and a lighted steamer pursuing a regular course. It appeared that the plaintiff's intestate was standing in the rowboat at the time of the accident, when the danger was impending, obviously a careless thing to do, and failed to make any outcry or display any light or do anything for his own protection, and, so far as the rowing was concerned, trusted the entire charge of the boat to one Thorn, who was negligent. The court held that the case fell within the rule of *Allyn v. Boston & Albany Railroad*.

In *Sullivan v. Boston Elevated Railway*, 185 Mass. 602, 606, in *Tilton v. Boston & Albany Railroad*, 169 Mass. 253, in *Robbins v. Fitchburg Railroad*, 161 Mass. 145, in *Evensen v. Lexington & Boston Street Railway*, 187 Mass. 77, and on one branch of his claim in *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104, the plaintiff based his own case upon the due care of the driver of the vehicle in which he was riding, thereby adopting the driver's acts as his own. In *Creavin v. Newton Street Railway*, 176 Mass. 529, and *LeBlanc v. Lowell, Lawrence, & Haverhill Street Railway*, 170 Mass. 564, the question of identification did not arise, as there was evidence in each case tending to show that the plaintiff actively exercised due care. The decision in *Kane v. Boston Elevated Railway*, 192 Mass. 386, was put upon the ground that the negligence of the defendant was not the cause of the accident to the plaintiff.

Imputed negligence has been the cause of somewhat conflicting decisions at various times in different jurisdictions. The doctrine had its rise in *Thorogood v. Bryan*, 8 C. B. 115, which held that a passenger of one common carrier could not recover against a third person, whose negligence contributed to his injury, in the

event that the negligence of the transporting carrier was a concurring cause of the injury. This case decided in 1849 has been overruled in England in *The Bernina*, 12 P. D. 53; *Mills v. Armstrong*, 13 App. Cas. 1. Although cited as a supporting authority in *Allyn v. Boston & Albany Railroad*, it was distinctly repudiated by this court in *Randolph v. O'Riordon*, 155 Mass. at page 387. The rule of *Thorogood v. Bryan* was early adopted in Wisconsin and has continuously prevailed there. *Houfe v. Fulton*, 29 Wis. 296. *Prideaux v. Mineral Point*, 43 Wis. 513. *Otis v. Janesville*, 47 Wis. 422. *Olson v. Luck*, 103 Wis. 33. *Lightfoot v. Winnebago Traction Co.* 123 Wis. 479. The Wisconsin court has made no distinction between a passenger of a common carrier and one riding gratuitously as the guest of the driver. It is the law of Michigan also that where a person of years of discretion voluntarily enters the private conveyance of another and is injured by the carelessness of the person in charge of the conveyance concurrently with the negligence of a third person, the plaintiff is precluded from recovery against such third person. *Lake Shore & Michigan Southern Railroad v. Miller*, 25 Mich. 274. *Schindler v. Milwaukee, Lake Shore & Western Railway*, 87 Mich. 410. *Cowan v. Muskegon Railway*, 84 Mich. 583. In *Mullen v. Owosso*, 100 Mich. 103, however, there was a vigorous dissenting opinion. This rule has been limited by the Supreme Court of Michigan so as to apply only to adults, the distinction being based upon the fiction that in such cases the relation of principal and agent exists, and it has been held that if the infant was so young as to lack the capacity to make the driver, at whose invitation she is riding as a guest, her agent, and where there is no evidence that either party supposed that such relation existed as a matter of fact, then the guest is not prevented from recovery by the neglect of the stranger at whose invitation she rides. *Hampel v. Detroit, Grand Rapids & Western Railroad*, 138 Mich. 1. The rule has been further limited so as not to apply to injuries received by one himself in the exercise of due care riding upon a fire engine injured by the concurring negligence of a motorman of the defendant and the driver of the engine in which the plaintiff was riding, following the same rule adopted by this court in *Murray v. Boston Ice Co.* 180 Mass. 165, *McKernan v. Detroit Citizens' Street Railway*, 138 Mich. 519;

and it does not apply to a passenger of one common carrier injured by the concurring negligence of it and another common carrier. *Cuddy v. Horn*, 46 Mich. 596, 602. The authority of the Wisconsin and Michigan cases prevailed upon the court of Montana to adopt the same rule. *Whittaker v. Helena*, 14 Mont. 124. Although *Thorogood v. Bryan* does not appear to have been called to the attention of the court in *Carlisle v. Sheldon*, 88 Vt. 440, the Supreme Court of that State has held any want of ordinary care on the part of a driver of a vehicle on the highway attributable to the one riding with him as guest.

In Pennsylvania the rule of *Thorogood v. Bryan* was at first adopted. *Lockhart v. Lichtenthaler*, 46 Penn. St. 151. *Philadelphia & Reading Railroad v. Boyer*, 97 Penn. St. 91. But these earlier cases have been overruled recently in *Dean v. Pennsylvania Railroad*, 129 Penn. St. 514, 520; *Bunting v. Hogsett*, 139 Penn. St. 863, 875; *Little v. Central District & Printing Telegraph Co.* 213 Penn. St. 229. It has never been applied in that State to cases like the one at bar, where the plaintiff has always been permitted to go to the jury. *Carlisle v. Brisbane*, 113 Penn. St. 544. *Carr v. Easton*, 142 Penn. St. 189.

The unbroken line of authority in all the other States in the Union is opposed to this reasoning. With some modifications in its application to particular cases, the general rule is that where the injured person and the driver do not occupy the position of master and servant, passenger and carrier, parent and child, and where the plaintiff is himself in the exercise of due care, having no reason to suspect carelessness or incompetency on the part of the driver, and is injured by the concurring negligence of the driver of the vehicle and some third person, the guest is not precluded from recovery against the third person by reason of the negligence of the driver. In *Elyton Land Co. v. Minge*, 89 Ala. 521, the court says at page 528: "The rule must be regarded as now fully settled, both in England and America, and certainly in this State, that the negligence of the driver of a vehicle can not be imputed to a passenger therein, when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection." The facts in this case were somewhat similar to

those in *Murray v. Boston Ice Co.* 180 Mass. 165, but the statement of the governing principle here and in the two following cases clearly include facts like those now before us. *Birmingham Railway & Electric Co. v. Baker*, 132 Ala. 507, and *Vormus v. Tennessee Railroad*, 97 Ala. 826, 831. In *Colorado & Southern Railway v. Thomas*, 33 Col. 517, the rule was laid down, as applicable to occupants of private conveyances, that in case of a person injured by the negligence of a defendant, and the contributory negligence of one with whom the injured person is riding as guest or companion, such negligence was not imputable to the injured person; although the exception to this rule was recognized that when the injured person was in a position to exercise authority or control over the driver, or was guilty of negligence, or failed "to exercise such care under the circumstances as he could, and should, exercise under the particular circumstances, to protect himself," there could be no recovery. The same rule has been declared by the Supreme Court of Arkansas, in *Hot Springs Street Railroad v. Hildreth*, 72 Ark. 572. In Illinois in cases like the one at bar the negligence of the driver is not imputed to the guest. *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 492. *Wabash, St. Louis & Pacific Railroad v. Shacklet*, 105 Ill. 364. *West Chicago Street Railroad v. Dougherty*, 209 Ill. 241. *Christy v. Elliott*, 216 Ill. 31.

A long series of decisions in Indiana supports the same view. It is forcibly expressed in *Knightstown v. Musgrove*, 116 Ind. 121, at page 123, as follows: "The general principle deducible from the decisions is, that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto. . . . Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each

other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him." *Michigan City v. Boeckling*, 122 Ind. 39. *Louisville, New Albany & Chicago Railway v. Creek*, 130 Ind. 139. *Chicago, St. Louis & Pittsburgh Railroad v. Spilker*, 134 Ind. 380. *Lake Shore & Michigan Southern Railway v. McIntosh*, 140 Ind. 261, 272. *Indianapolis Street Railway v. Johnson*, 163 Ind. 518.

The Supreme Court of Iowa follows the same rule, using the language at page 319 in *Nesbit v. Garner*, 75 Iowa, 314, after saying that the relation of principal and agent must exist in fact in order to bar a recovery, that "The law will not create or presume the relation from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant." The like doctrine has been adopted in Kansas, *Leavenworth v. Hatch*, 57 Kans. 57; and in Kentucky, in *Cahill v. Cincinnati Railway*, 92 Ky. 345, 355. See also *Louisville Railway v. Anderson*, 76 S. W. Rep. 153. The same rule has been followed in *State v. Boston & Maine Railroad*, 80 Maine, 430, 446, and *Neal v. Rendall*, 98 Maine, 69. An exception appears to exist in Maine, not founded on principle, but based upon statutory provisions, in actions against municipalities for injuries caused by defects in highways, where it is held that the rider even though a guest is responsible for the negligence of the driver. *Barnes v. Rumford*, 96 Maine, 315. In Minnesota the rule respecting imputed negligence, excepting where the relation of parent and child or guardian and ward exists, is that "Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in



the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others." *Koplitz v. St. Paul*, 86 Minn. 373. *Teal v. St. Paul City Railway*, 96 Minn. 379. *Cunningham v. Thief River Falls*, 84 Minn. 21.

The same general rule prevails in Missouri: *Dickson v. Missouri Pacific Railway*, 104 Mo. 491, 504; *Holden v. Missouri Railroad*, 177 Mo. 456; *Johnson v. St. Joseph*, 96 Mo. App. 663; and in Maryland, *Baltimore & Ohio Railroad v. State*, 79 Md. 335, 344. See *Consolidated Gas Co. v. Getty*, 96 Md. 683; *United Railways v. Biedler*, 98 Md. 564; and in New Hampshire, *Noyes v. Boscawen*, 64 N. H. 361, 368, 369; in California, *Bresee v. Los Angeles Traction Co.* 85 Pac. Rep. 152; and is supported by a long line of cases in New York, beginning with *Robinson v. New York Central & Hudson River Railroad*, 66 N. Y. 11. In *Brickell v. New York Central & Hudson River Railroad*, 120 N. Y. 290, a case like *Allyn v. Boston & Albany Railroad*, *ubi supra*, the rule is held to be applicable only to cases where "the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an enclosure and is without opportunity to discover danger and to inform the driver of it. . . . It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and to avoid it if practicable." But generally in New York, the guest has not been barred of recovery by the negligence of the driver as matter of law, the circumstances in each case having been held to be such as to make the plaintiff's due care a question of fact. See *Robinson v. Metropolitan Street Railway*, 91 App. Div. (N. Y.) 158, affirmed in 179 N. Y. 593; *Van Vranken v. Clifton Springs*, 86 Hun, 67; *Morris v. Metropolitan Street Railway*, 63 App. Div. (N. Y.) 78; *Dyer v. Erie Railway*, 71 N. Y. 228; *Masterson v. New York Central & Hudson River Railroad*, 84 N. Y. 247; *Phillips v. New York Central & Hudson Railroad*, 127 N. Y. 657, 660; *Strauss v. Newburgh Electric Railway*, 6 App. Div. (N. Y.) 264; *Bailey v. Jourdan*, 18 App. Div. (N. Y.) 387;

*Mack v. Shawangunk*, 90 N. Y. Supp. 760. The same rule has been laid down in *Alabama & Vicksburg Railway v. Davis*, 69 Miss. 444. See *Illinois Central Railroad v. McLeod*, 78 Miss. 334. The precise question has arisen in New Jersey, and the doctrine of imputed negligence of a driver to a voluntary passenger is not adopted. *Consolidated Traction Co. v. Hoimark*, 31 Vroom, 456. *Noonan v. Consolidated Traction Co.* 35 Vroom, 579. *Thorogood v. Bryan* is discredited there. *New York, Lake Erie & Western Railroad v. New Jersey Electric Railway*, 31 Vroom, 338, 348. *New York, Lake Erie & Western Railroad v. Steinbrenner*, 18 Vroom, 161. In an exhaustive opinion the Supreme Court of North Carolina has refused to adopt the doctrine of imputed negligence in *Duval v. Atlantic Coast Line Railroad*, 134 N. C. 381, and *Crampton v. Ivie Bros.* 126 N. C. 894. It has been repudiated also in *Transfer Co. v. Kelly*, 36 Ohio St. 86, *Cincinnati Street Railway v. Wright*, 54 Ohio St. 181, 193. In *Metropolitan Street Railroad v. Powell*, 89 Ga. 601, 611, the Supreme Court of Georgia held that the plaintiff under conditions almost exactly like those in the case at bar might go to the jury. The same is true in North Dakota: *Ouerson v. Grafton*, 5 No. Dak. 281, 293; and in Tennessee, *Hydes Ferry Turnpike Co. v. Yates*, 67 S. W. Rep. 69; and in Delaware, *Farley v. Wilmington & Newcastle Electric Railway*, 52 Atl. Rep. 543; and in Texas, *Missouri, Kansas & Texas Railway v. Rogers*, 91 Texas, 52, 58; *Galveston, Harrisburg & San Antonio Railway v. Kutac*, 72 Texas, 643, 652; *Central Texas & Northwestern Railway v. Gibson*, 35 Tex. App. 66; and in Virginia, *Atlantic & Danville Railroad v. Ironmonger*, 95 Va. 625; and in Washington, *Shearer v. Buckley*, 31 Wash. 370; and in Nebraska, *Hajsek v. Chicago, Burlington & Quincy Railroad*, 68 Neb. 539, although, in the last named State, in a case of joint enterprise between the driver and the plaintiff, the negligence of the driver has been imputed to the plaintiff. *Omaha & Republican Valley Railway v. Talbot*, 48 Neb. 627.

The question of imputed negligence was before the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 366, where the facts were similar to those in *Randolph v. O'Riordan*, 155 Mass. 331. *Thorogood v. Bryan* was discredited as resting "upon indefensible ground," and the court lays down the rule in this language: "That one cannot recover damages for an injury to

the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like." In the course of this opinion, *Dyer v. Erie Railway*, 71 N. Y. 228, a case on all fours with the one at bar, is cited with approval as a supporting authority. Relying upon *Little v. Hackett* as authority, the federal courts have refused to impute the negligence of the driver to a gratuitous passenger in a private conveyance. *Pyle v. Clark*, 75 Fed. Rep. 644; *S. C.* 79 Fed. Rep. 744. *Griffith v. Baltimore & Ohio Railroad*, 44 Fed. Rep. 574. *Union Pacific Railway v. Lapsley*, 51 Fed. Rep. 174. *Sheffield v. Central Union Telephone Co.* 36 Fed. Rep. 164. *Evans v. Lake Erie & Western Railway*, 78 Fed. Rep. 782. *Honey v. Chicago, Burlington & Quincy Railway*, 59 Fed. Rep. 427. See *Delaware, Lackawanna & Western Railroad v. Devore*, 114 Fed. Rep. 155; *Denver City Tramway Co. v. Norton*, 141 Fed. Rep. 599, 609.

Text-book writers generally have also expressed the same view. 7 Am. & Eng. Encyc. of Law, (2d ed.) 447. 1 Thompson, Negligence, § 502. 1 Shearman & Redfield, Negligence, § 66. Beach, Contributory Negligence, § 115.

If the subject is considered apart from decided cases and upon sound reason, the same conclusion is reached. There is no ab-

stract principle of law by which an innocent person, in the full possession and exercise of his faculties and himself using due care, should be prohibited from recovery against a wrongdoer whose tortious act contributes as a proximate cause to his injury. It is familiar law that an injured person may recover against one or both of two wrongdoers between whom there is no concert of action, whose concurring act produces the injury, even though the act of either alone might not have caused any harm, when "no distinction can be drawn between their acts." *Oulighan v. Butler*, 189 Mass. 287, 298. *Corey v. Havener*, 182 Mass. 250. Where the injury has resulted from the negligent act of another, the plaintiff may recover if such negligence was the efficient cause. In other phrase, where the defendant is the doer of a wrong, which causes an injury to a plaintiff, who is free from any contributory negligence, the circumstance that the negligence of a third party also contributed to the injury does not ordinarily bar recovery. The innocent injured plaintiff ought not to go remediless against one, by whose wrongful act he was harmed. Under the conditions existing in the case at bar, recovery by the plaintiff can only be prevented by judicially imposing upon the purely humane, social or benevolent act of hospitality the fiction of assuming the contractual relation of principal and agent between the guest and host. Such relation in fact does not exist. The parties themselves would at once repudiate it, and indeed the association itself is repugnant to the thought of contract. Such a fiction ought not to be resorted to, except under the imperative requirement of some technical legal rule or to accomplish a manifest justice. Its invocation in the present case is not made necessary by such rule and its application only serves to protect a wrongdoer from the natural consequences of his acts, so that it fails of justification on both grounds. In principle, apart from special rules often enacted by common carriers, there seems to be no greater or different duty resting upon the recipient of a gratuitous excursion in a private conveyance to direct the driver in the performance of his duty or to warn him of approaching risk, than is imposed upon a passenger for hire occupying a seat beside a motorman in an electric car or driver of an omnibus. In either case, there is no contractual obligation. It is simply what under all the

circumstances may be an exercise of due care. If the doctrine of principal and agent is to be applied to cases like the one now before us, its logic compels the application to the case of the passenger in the hired cab and the imputation of the driver's negligence to him. This seems to be the course followed in *Nicholls v. Great Western Railway*, 27 U. C. (Q. B.) 382; *Winckler v. Great Western Railway*, 18 U. C. (C. P.) 250. Moreover, it is but a rational extension of the rule to hold the gratuitous passenger, if he is to be precluded from recovery against a wrongdoer by reason of the negligence of his driver on the theory that the latter is his agent, himself liable also in an action of tort to any one injured by the negligence of this same driver. If he is prevented from availing himself of a right of action for the wrong of another on the ground of the negligence of his agent, the converse of this proposition necessarily holds true. He must be responsible to a child negligently run down in the street by his host, who is driver and assumed agent. The responsibility of the invited guest for the negligence of his host must be coextensive with the agency. The purpose of the agency is the driving of the vehicle, and hence it follows that the guest will be liable for any injury negligently occasioned in the driving. If the driver's want of care is imputed to the guest when injury is received by him, to the same extent must the imputation exist when harm is inflicted. To thus press the doctrine of imputed negligence to its logical conclusion demonstrates its unsoundness. It is neither just nor reasonable nor consonant with any principle of jurisprudence to require the plaintiff to go remediless for a wrong committed against her by the defendant, which she neither contributed to, was responsible for, nor could have prevented. To send her out of court would be to punish the innocent and discharge the guilty.

The rule fairly deducible from our own cases, and supported by the great weight of authority by courts of other jurisdictions is that where an adult person, possessing all his faculties and personally in the exercise of that degree of care, which common prudence requires under all the attending circumstances, is injured through the negligence of some third person and the concurring negligence of one with whom the plaintiff is riding as guest or companion, between whom and the plaintiff the rela-

tion of master and servant or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one through whose wrong his injuries were sustained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver.

Applying this statement of the law to the present case, the result is that the plaintiff would not be entitled to recover if in the exercise of common prudence she ought to have given some warning to the driver of carelessness on his part, which she observed or might have observed in exercising due care for her own safety, nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence. What degree of care she should have exercised, in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by him, depends upon the circumstances at the time of the injury. On the other hand, she would be permitted to recover if, in entering and continuing in the conveyance, she acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to do any act for her own protection.

In view of the facts of the case the requests for rulings presented by the plaintiff were not correct propositions of law and were properly refused, but the portion of the charge excepted to failed to express with accuracy and fulness the rights of the plaintiff and the liability of the defendant to her. The jury were instructed to treat the plaintiff as identified with the

driver, and burdened with his negligence. For the reasons we have stated and under the circumstances disclosed, this was not an accurate statement of the law.

*Exceptions sustained.*

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ELIZABETH J. HAMILTON vs. BOSTON AND NORTHERN  
STREET RAILWAY COMPANY.

ALEXANDER B. HAMILTON vs. SAME.

Essex. November 7, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON & RUGG, JJ.

*Negligence. Street Railway.*

In an action against a street railway company for personal injuries, a strong, healthy woman about thirty-five years of age having with her a little boy two years old may be found to have been in the exercise of due care when attempting to board an open electric car of the defendant, if she lifted the little boy to the floor of the car, from which he climbed upon a seat, and she then stepped on the running board and said to the child "push over," in order to make room for herself at the outside end of the seat, leaning toward the child to help him over, and had her arms extended in front of her for this purpose when the car started with a sudden jerk, and she was injured.

When a woman having in charge a child two years of age is attempting to board an open electric car it is the duty of the conductor to ascertain whether she has got into such a position as to make it safe to start the car before he gives the signal for starting, especially if the car is at the beginning of a curve where there is likely to be more than the ordinary jar and sway as it starts.

TWO ACTIONS OF TORT, the first for injuries alleged to have been caused by the negligence of the servants of the defendant in starting suddenly one of its open electric cars as the plaintiff was attempting to board it on Franklin Street in Lynn at the corner of Boston Street on September 22, 1901, and the second by the husband of the plaintiff in the first case for his loss and damage caused by her injuries. Writs dated April 21, 1902.

At the trial in the Superior Court Aiken, C. J. ruled that upon the evidence the plaintiffs were not entitled to recover, and ordered a verdict for the defendant. The plaintiffs alleged exceptions.

*W. A. Kelley, (J. F. Quinn with him,) for the plaintiffs.*

*D. E. Hall, (H. F. Hurlburt with him,) for the defendant.*

RUGG, J. These are actions of tort, the first to recover for injuries alleged to have been sustained by the female plaintiff by reason of the sudden starting of a car of the defendant before she had a reasonable opportunity as a passenger to reach a place of safety within the car. The second action is by the husband of the first named plaintiff. Hereafter in this opinion the word "plaintiff" refers to the wife. There was evidence tending to show that the plaintiff with her little boy two years old started to get upon an open car of the defendant in Lynn. The conductor said to her, "Are you going to ride on this car, lady?" To which she replied, "Yes, sir, if you find me a seat." Pointing to the second last seat, he said, "Here's a seat here." She lifted the little boy on the floor of the car, and he climbed on to the seat. She then stepped up on the running board, on to the car, and said to the child, "push over," in order to make room for herself at the outside end of the seat. Both her arms were up, the bell rang twice, and the car started. Other persons had boarded the car, and as the last of these got on she was lifting her child on to the car. The car was not full. There seemed to her to be about three persons in the seat at the time. They were sitting on the opposite end of the seat. The conductor, although standing on the running board ahead of the plaintiff and then getting down and walking past her to the rear of the car, did not help the child or the plaintiff to get aboard the car. When the child got up on to the seat, there was very little room between him and the end of the seat, not room enough for the mother to sit down. When she said to the child, "push over," she leaned toward him in order to help him over herself, and her arms were extended in front of her for the purpose of assisting the child. As the car started she struck across the chest on the back of the seat, and her head struck the post at the end of the same seat. She was facing partly forward and partly sideways, and the car started with a sudden jerk. When the car started it was at the beginning of a curve. The plaintiff was a strong healthy woman about thirty-five years of age.

From these facts it is not wholly clear whether the plaintiff had stepped upon the floor and was within the body of the car, although perhaps from the position in which she fell there is strong reason for inferring that she was within the car. She



was encumbered, however, with the care of a small child, and it was at least prudent for her to insist that he should not remain at the end of the seat during the journey, with all the attendant dangers of such a position to one physically weak and not possessed of discretion. See *Spooner v. Old Colony Street Railway*, 190 Mass. 182. There is nothing to show that the plaintiff was not proceeding with due expedition in placing her child in a position of safety, and undertaking to secure a seat for herself. It is therefore plain that there was sufficient evidence to warrant a finding that she was in the exercise of due care.

It was the duty of the conductor to ascertain whether the plaintiff had boarded the car and had got in such position as to make it safe to start. *Gordon v. West End Street Railway*, 175 Mass. 181. Of course this does not necessarily mean that he must wait until every passenger had become seated before giving the signal to start, nor was he under any obligation to notify passengers that he was about to give the starting signal. *Weeks v. Boston Elevated Railway*, 190 Mass. 563. The adoption of such a rule would seriously impair the rapid transportation of passengers, which is one of the imperative demands of the present conditions of living. Moreover, it is not in the great majority of cases necessary for the safety of passengers, as it is every day observation that cars are constantly started before passengers are seated, and without danger. Nevertheless, where a passenger is encumbered with the care of a child, not only is she herself obliged to exercise greater care than if alone, but common prudence requires that the street railway company also act with greater caution in view of the circumstances which surround such a passenger. The degree of care required of a common carrier of passengers respecting a healthy woman travelling alone is not necessarily the same as that required of it respecting the same woman having charge of a child two years old. This car was at the beginning of a curve, where it was likely that there would be more than the ordinary jar and sway as it started. Under the circumstances of this case, it cannot be ruled as matter of law that there was no evidence of negligence on the part of the conductor of the defendant in starting the car as and when he did.

*Exceptions sustained.*

WALTER S. HODGDON vs. CITY OF HAVERHILL.  
SAME vs. SAME.

Essex. November 7, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Constitutional Law. Tax, Assessments for street watering. Pleading, Civil, Declaration or petition, Statute of limitations. Equity Pleading and Practice. Limitations, Statute of.*

St. 1897, c. 419, now R. L. c. 26, §§ 26, 27, authorizing assessments for the watering of streets in cities, is constitutional as applied to occupied estates in the central portion of a large city. Following *Sears v. Boston*, 173 Mass. 71.

In a petition to recover from a city assessments for street watering paid under protest, an averment, that the lot opposite the petitioner's estate is unoccupied, belongs to two owners and is divided in the middle by a fence, is not equivalent to an averment that the petitioner's estate is not an occupied estate in the central portion of a large city.

A petition in the nature of a bill in equity to recover from a city assessments for street watering paid under protest, even if it can be amended in such a way as to show that the remedy is a proper one, must be dismissed on demurrer if it contains no averments showing the assessments to have been illegal.

The defence in a personal action that the cause of action accrued more than six years before the date of the writ must be taken by answer and not by demurrer.

A declaration in an action against a city, purporting to be an action of contract, alleging that the defendant is indebted to the plaintiff in a sum named, by reason of making a forcible entry upon the plaintiff's close and appropriating a certain portion of the plaintiff's front yard for sidewalk use, and continuing in adverse possession thereof for nearly twenty years, assessing and collecting taxes against the land and refusing the plaintiff compensation, the plaintiff claiming sufferance rent for the period of detention of the land by the defendant, does not set forth a cause of action.

SHELDON, J. The first of these actions appears to be a petition to recover back the amount of assessments for street watering, assessed upon the petitioner's estate in Haverhill for the successive years from 1897 to 1904, inclusive, by the boards of aldermen of Haverhill for those respective years, upon the averments that he had protested in each of these years against sprinkling the street in front of his estate, that in each year he petitioned the board of aldermen for an abatement but that generally his petitions were referred to the files without having been read, and that he was not notified by the respective boards

of aldermen of any action taken by them. He avers that the first three of these assessments were collected from some person to him unknown, and that the last five were paid by him under protest. The respondent filed a general demurrer to this petition; and the case comes before us on the petitioner's appeal from an order of the Superior Court dismissing his petition.

These assessments appear to have been laid under St. 1897, c. 419, now R. L. c. 26, §§ 26, 27. We find no averment in the petition upon which it can be contended that the assessments were not levied in compliance with the provisions of this statute; and its constitutionality, as applied to occupied estates in the central portion of a large city, has been affirmed upon careful examination by this court. *Sears v. Boston*, 173 Mass. 71. The mere averment that the lot opposite the petitioner's estate is unoccupied, belongs to two owners, and is divided in the middle by a fence, is in no sense equivalent to an averment that the petitioner's estate is not an occupied estate within the central portion of a large city. No attempt has been made to quash any of these assessments by a petition for certiorari. R. L. c. 192, § 4. No abatement has been made by the assessors under R. L. c. 26, § 27. No attempt has been made by petition for mandamus or otherwise, to compel action by the boards of aldermen or by the assessors upon any proceedings taken by the petitioner before them. Nor is the question presented whether the petitioner could treat the non-action of the boards of aldermen upon his petitions as a refusal by them to give him any relief; and whether he could thereupon obtain redress under the provisions of R. L. c. 12, §§ 77, 78. Apart from the difficulties stated in the memorandum of the judge of the Superior Court,\* and assuming with-

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\* The memorandum was made by *Bell, J.*, and the portion referred to was as follows:

"No. 4885 is a petition asking the repayment of certain assessments for street watering alleged to be illegal and paid under protest. Such assessment could only be abated by the assessors on the recommendation of the aldermen. R. L. c. 26, §§ 26, 27. If as he alleges the aldermen have refused to give him a hearing on his petition for abatement, they have done him a wrong, but whether that refusal has made the assessment void, cannot be determined in this proceeding.

"Although the defendant has not expressly taken that objection, the proceedings in this form cannot be sustained and no judgment could be founded

out intimating that the petitioner could find a way of getting over these difficulties by amendment, we see no ground upon which the petition can be maintained. Accordingly the order of the Superior Court dismissing this action must be affirmed; and it is

*So ordered.*

The second case is an action of contract, in which the plaintiff's declaration reads as follows: "And now comes the plaintiff in the above entitled action, and says that the defendant is indebted to him in the sum of five hundred and eighty-three dollars and forty-four cents, with costs, to wit: That, in open court, on the second day of December, 1903, at Haverhill; and on the sixteenth day of June, 1904, at Salem; and on the thirtieth day of November, 1904, at Lawrence, the defendant confessed to making a forcible entry upon the plaintiff's close, in June, 1885, and to appropriating sixty square feet or one tenth of the plaintiff's front yard for sidewalk use; and the defendant continued the said adverse possession up to the eighteenth day of May, 1905, and, without protest, assessed and collected taxes against the said land throughout the said adverse possession and has refused to give the plaintiff any compensation. And the plaintiff claims sufferance rents for the seven thousand two hundred and ninety-three days, which the defendant detained the said land, at the rate of eight cents per day, with court costs." The defendant demurred to this declaration on the grounds that the plaintiff's grievance was the taking of land for the purpose of a highway and the plaintiff's remedy was by petition for the assessment of damages; that there was no allegation of an agreement, expressed or implied, necessary to establish the relation of landlord and tenant; that the plaintiff's cause of action was for forcible entry by the defendant upon the plaintiff's land and appropriating a part thereof as a sidewalk, and for such wrongful acts an action of contract does not lie; and that no cause of action

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on them. R. L. c. 167, § 15 requires such actions to be begun by writ. While St. 1887, c. 883 was in force the action could have been begun by petition but that act was omitted from the Revised Laws on the recommendation of the commissioners and expressly repealed. R. L. c. 227.

"Whether by amendment the defect can be remedied, I do not express an opinion."

known to the law was set forth. A further alleged cause of demurrer, that it appears from the declaration that the cause of action did not accrue within six years before the suing out of the plaintiff's writ, need not be considered; for it is settled that this is a defence which should be taken by answer and not by demurrer. *Sawyer v. Boston*, 144 Mass. 470, 472. *Thomas v. Waterman*, 7 Met. 227, 229. It is for this reason that, if a new promise or other new matter is relied upon to remove the bar of the statute, the declaration is properly upon the original cause of action, and the new matter may then be shown in reply to a plea of the statute of limitations. *Baxter v. Penniman*, 8 Mass. 133. *Way v. Sperry*, 6 Cush. 238, 241.

It is manifest, however, that the facts alleged in the declaration show nothing more than a trespass upon the plaintiff's land, followed by a continued unlawful possession thereof for nearly twenty years.\* As the plaintiff does not aver any express contract by the defendant to pay him for the use of this land and does not set out any facts from which such a promise could be implied, it requires no citation of authorities to show that this action cannot be maintained as brought. If, as was suggested in the plaintiff's brief, though not averred in his declaration, his land was taken by eminent domain for the construction of a sidewalk, he was given full redress under the statutes now embodied in R. L. c. 48. If he has lost this right by his own delay in enforcing it, he cannot resort to the remedy sought in this action. *Lancy v. Boston*, 185 Mass. 219, and cases there cited. Accordingly the defendant's demurrer properly was sustained.

If in the opinion of the plaintiff, any amendment of his writ or declaration would enable him to maintain his action, he must apply to the Superior Court for the necessary permission.

Accordingly, upon the pleadings before us, the order of the Superior Court sustaining the demurrer and ordering judgment for the defendant must be affirmed; and it is

*So ordered.*

*W. S. Hodgdon, pro se.*

*G. M. G. Nichols*, for the defendant, submitted a brief.

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\* The date of the writ was June 26, 1905.

WALTER S. HODGDON vs. EDMUND B. FULLER & others.

Essex. November 7, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Practice; Civil, Appeal.*

On an appeal from a final decree made by a single justice of this court dismissing a petition for a writ of mandamus, where the evidence before the justice is not reported to the full court, a finding by him that the allegations of the petition were not proved cannot be revised.

PETITION for a writ of mandamus.

The case was heard by *Braley, J.*, who made a final decree as follows :

“ Upon the evidence of the petitioner and after full argument by him and upon consideration thereof it is found that the allegations of said petition are not proved, and it is ordered and decreed that said petition be dismissed without costs as to all the respondents and without prejudice to the rights of said petitioner, if any he has, to proceed under R. L. c. 156, § 4.”

The petitioner appealed.

*W. S. Hodgdon, pro se.*

*E. S. Abbott & F. H. Pearl*, for the respondents, submitted a brief.

SHELDON, J. We are unable to see that any question of law is raised by this appeal. The respondents in their answer, after admitting that the respondents Fuller and Sargent were respectively the standing justice and clerk of the Central District Court of Northern Essex, denied all the other allegations made by the petitioner. At the hearing before a single justice of this court it was found that the allegations of the petition were not proved. The evidence before him is not reported; and this finding of fact cannot be revised. And upon this finding evidently the petition cannot be maintained. The decree dismissing the petition must be

*Affirmed.*

## DENNIS FOLEY vs. BOSTON AND MAINE RAILROAD.

Essex. November 8, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, &amp; RUGG, JJ.

*Evidence, Judicial notice, Force of words. Negligence. Railroad.*

It is a matter of common knowledge that from time to time the tracks of steam railroads must be repaired and bridges must be replaced, and that in the performance of this work it may be necessary to use crossovers from one main track to another.

It is a matter of common knowledge that in the proper operation of a passenger train on a steam railroad there may be jerks and lurches.

In considering the description of an accident by a witness little if any weight is to be given to expletive or declamatory words or phrases which appear to have been used in an exaggerated or distorted sense.

If a passenger in the smoking car of the train of a steam railroad, knowing but unmindful of the facts that the train is about to pass over a bridge that is undergoing repairs where there are double tracks and will have to pass by means of a crossover from one track to the other, that when the car strikes the switch there will be more or less of a jar, its force depending upon the speed of the train, and that the train is moving swiftly, and being unable to find a seat in the smoking car where five or six passengers are standing in the aisle, stands immediately inside the threshold of the doorway leading to the back platform of the car, with his back against the door, which is open, and his hands down at his sides, when there come a lurch and jar of the train which throw him against another passenger and then out on the platform and backward to the ground, where he is injured, he has not exercised due care and cannot recover from the railroad company for his injuries, even if the company was negligent.

TORT for injuries sustained while a passenger on a train of the defendant by being thrown from the platform of one of the cars of the train. Writ dated September 22, 1902.

In the Superior Court the case was tried before Fox, J. The accident occurred at about midnight of a day in summer near Beverly Bridge, so called, over which trains run from Salem to Beverly. The plaintiff testified that he was forty-seven years old, and boarded the train at Salem for Beverly at about 11.40 o'clock P. M.; that he went into the rear end of the smoking car, and walked by three or four seats to see if he could find a vacant seat, but did not see any; that five or six passengers were standing in the aisle; that he then came back toward the rear of the

car, intending to go into the car behind, but did not go there nor attempt to; the train then being in motion; that he stood from one to three inches inside the threshold of the car, the door being open, with his back against the door and his hands down at his sides. Although there were double tracks between Salem and Beverly, by reason of repairs in progress on one track there was a crossover and switch, so that trains bound from Salem for Beverly were switched on to the other track before crossing the bridge. The plaintiff knew that this crossover was there and that it had been there for several days, and had ridden over it at an earlier hour on the same evening. He knew that the train was going swiftly, and knew that when a car going swiftly struck a switch there would be more or less jar, depending upon the swiftness of the car, but did not think about it. A lurch or jar of the train came, and he was thrown with "the awful force of the car," and pushed forward against another man, and thrown out on the platform and over the steps out backward upon the ground. There was a "terrible jar" or lurch. The plaintiff, if he had wanted to, might have gone farther up in the car and stood with safety.

One Davis, a passenger, testified that he was standing in the forward part of the car next behind the smoker, inside and close to the door, but did not notice the plaintiff; that there was a crowd in the smoking car and many were standing, and there were no vacant seats; that he noticed a sudden and pretty severe lurch, which threw him into a man's lap; that he did not go down, but it was just a lurch, and he had to put his hands out to save himself; that he did not notice the speed of the train, whether fast or slow at the time of the lurch, and did not know whether there were seats in other cars at Salem or not.

One McGovern, a passenger, testified that he was standing in the car behind the smoker, and there were no vacant seats; that he supposed the train was going at the regular rate of speed, when suddenly there was an unexpected jar, which caused people in his car to go forward and back, and one fell over against his lap; that he saw the plaintiff go forward and then backward out of the door.

One Brady, also a passenger, called by the plaintiff, testified



that there was quite a violent jerk about half way between Salem and Beverly; that he was thrown to the right and forward.

One McMorrell testified that he was a passenger standing in the smoker inside the rear door, and did not see any vacant seats; that the train went at its regular rate of speed between Salem and Beverly, until in the vicinity of the bridge it "slackened up a mite," and in resuming its regular speed a jar came, and people in the car came backward on him, and he went backward on the plaintiff; that it was the starting that caused him to go backward; that the train remained stationary or partly so for a brief time, and when it started there was a jerk which threw him off his balance backward; that it was not the lurch of the train passing over the crossover which threw him off, but the start after starting up; that the jerk was of such a character that if nobody had been behind him, and he had had room, by simply putting his foot backward he would have recovered his balance.

Evidence was introduced by the defendant tending to show that the crossover was of ordinary construction and was properly adapted to the uses to which it was put; that the speed of the train was eight miles an hour; and that "there were vacant seats in some of the other cars" upon the train.

At the close of the evidence the defendant asked the judge to order a verdict for the defendant. The judge refused to do this, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,350. The defendant alleged exceptions.

*D. E. Hall*, (*H. F. Hurlburt* with him,) for the defendant.

*W. A. Peay, Jr.*, (*D. W. Quill* with him,) for the plaintiff.

RUGG, J. It is at least difficult to see how, upon this testimony, there was any negligence on the part of the defendant. *Timms v. Old Colony Street Railway*, 183 Mass. 193. It is a matter of common knowledge that tracks of steam railroads must be repaired and bridges replaced from time to time, and that, in the performance of this work, it may be necessary to use crossovers from one main track to another. It is also common knowledge that in the performance of the duty resting upon steam railroads of rapid and prompt transportation, even in the exercise of the high degree of care required of them, there may be jolts and

lurches in the management of trains. *Weinschenk v. New York, New Haven, & Hartford Railroad*, 190 Mass. 250. *Byron v. Lynn & Boston Railroad*, 177 Mass. 303. There is nothing to show that the jar in question resulted from any negligent act on the part of the defendant, either as to speed or construction of car or track. The speed was described as "swift," and the jar or lurch as "quite violent," "terrible," "awful," "very severe," and "unexpected." But mere expletive or declamatory words or phrases as descriptive of speed or acts, unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if indeed they are of any, assistance in determining the real character of the fact, respecting which they are used.

Passing to the other branch of the plaintiff's case, there are greater difficulties in his way. He knew of the existence of the crossover, and that it had been there for several days, and that all trains going to Beverly from Salem were obliged to use it, and that the going upon the crossover would cause more or less jar to the train. He also testified that if he had supported himself by his hands he would not have been thrown off his balance. He took his position within, at farthest, three inches from the open door of the car, although he might have stood farther in the car in a place of perfect safety, and he failed to investigate whether there were vacant seats in other cars of the train than the one in which he was standing. It is manifest that no injury would have been sustained by him if he had been seated. It has been said that one who elects to stand in a steam train, when there are vacant seats, cannot recover for an accident which he would not have suffered except for his standing position. *Farnon v. Boston & Albany Railroad*, 180 Mass. 212. To be either upon the platform of a car or just within its threshold on the way to and in search of a permanent place of safety within a car is quite different from voluntarily taking one's stand for the journey barely inside an open door, with the knowledge that by reason of construction repairs, reasonably and necessarily prosecuted, so far as appears, the train must pass over a switch under

such circumstances as almost necessarily to cause some disturbance to the train.] The plaintiff testified that he intended to go back into other cars of the train, but, without any disclosed reason for so doing, he stood in this position of danger while the train passed a distance of three quarters of a mile. Under the particular circumstances of this case, with the plaintiff's special knowledge of conditions, he cannot be said to have been in the exercise of such care as ordinary prudence requires.

*Exceptions sustained.*

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ANDRE W. RICHARDSON, trustee, vs. MICHAEL DEVINE.

Essex. November 8, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Practice, Civil, Special questions to jury, Exceptions. Co-operative Society. Corporation. Bankruptcy. Evidence.*

A party to an action, who at the trial took no exception to the submission of a special question to the jury and apparently made no objection to the manner in which it was submitted, when his case is before this court on exceptions cannot raise the point that he was prejudiced by the form of the question to the jury, especially where as here the description in the bill of exceptions of the transaction to which the question-related makes clear both the meaning of the question and the correctness of the answer.

In an action by the trustee in bankruptcy of a co-operative trading corporation to recover money paid to the defendant by the manager of the corporation after it became insolvent, it appeared that the payment was of the sum of \$500 and was made by the manager to the defendant for "shares withdrawn." It was shown that the manager had no right to make the payment without authority from the board of directors, even if the company had been solvent. The jury found that the defendant was a shareholder of the corporation, that the manager was not authorized by the board of directors to make the payment to the defendant on account of the withdrawal of his shares, and that the corporation was insolvent at the time of the payment. The defendant contended that the manager by virtue of his position had authority to make the payment to the defendant. The only by-law of the corporation in regard to the withdrawal of money by stockholders on account of their stock gave the manager and the president acting jointly authority to permit a stockholder to withdraw a sum not exceeding \$10 and to submit the matter to the directors at their next meeting. Evidence was admitted, subject to the exception of the defendant, that in all cases of the withdrawal of sums greater than \$10, previous to the payment to the defendant, an application was made to the directors and the withdrawal was authorized by

them before the money was paid out. *Held*, that the evidence was admitted properly, being competent to controvert the defendant's contention as to the manager's authority to make the payment to the defendant.

In an action by the trustee in bankruptcy of a co-operative trading corporation to recover money paid to the defendant by the manager of the corporation after it became insolvent, it appeared that the payment was of the sum of \$500 and was made by the manager to the defendant for "shares withdrawn." It was shown that the manager had no right to make the payment without authority from the board of directors, even if the company had been solvent. There was evidence that the stockholders had voted to add an amendment to the by-laws "that no person be allowed to hold more than \$400 in stock of the society," and there also was evidence that from that time to the date of the adjudication of the bankruptcy of the society "various shareholders held shares in excess of \$400 with the knowledge and consent of the society." *Held*, that the vote did not enlarge the defendant's rights in regard to the withdrawal of his shares, nor make him a creditor for the amount invested above the sum of \$400.

KNOWLTON, C. J. This is an action brought by a trustee in bankruptcy of the Lawrence Equitable Co-operative Society, a corporation organized in 1894 under the provisions of Pub. Sts. c. 106, as a dealer in household and personal supplies on the co-operative plan, which was adjudged bankrupt on October 5, 1893, to recover money paid to the defendant by the manager of the corporation after it became insolvent. The defendant was the holder of a pass book given him by the corporation, upon which on July 1, 1903, was entered as the amount of his "present claim shares," \$520.49. Upon this pass book, on August 25, 1903, there was entered under the head "Shares Withdrawn," the sum of \$500, making the balance under the head "Present Claim Shares," \$20.49. At different times within two or three days of this time the manager of the corporation paid different sums to the defendant, amounting to \$500, represented by this entry. In reply to a question in writing put by the judge to the jury at the trial, they answered that the corporation was insolvent at the time of this payment, and it is not contended that any error entered into this finding. To the question, "Was the defendant the creditor of the Lawrence Equitable Co-operative Society or a shareholder therein?" they answered, "Shareholder." They also answered "No" to the question, "Was the manager authorized by the board of directors of the society to make payment to the defendant on account of the withdrawal of his shares?" The defendant objected to the refusal of the judge to give certain rulings that he requested and

to a part of the charge. In view of the findings, many of these requests are now immaterial.\*

There was ample evidence to warrant the finding that the defendant was a shareholder in the corporation. Indeed, the evidence to this effect was almost overwhelming. The defendant contends that the judge deprived him of a part of his defence by directing the jury to answer the second question, referred to above, "Shareholder" or "Creditor." He says that the jury might have found that he had no relation to the corporation, and that the money which he had furnished on account of which the manager made the payment was a loan to the manager personally. The reply to this is that he took no exception and apparently made no objection to the manner in which the questions were submitted to the jury. Besides, the description of the transaction, including the giving of the pass book, in the bill of exceptions, is such as to make it certain that the defendant was dealing with the manager of the corporation as the corporation's representative, and not in his personal capacity.

Upon the undisputed evidence it is plain that the manager had no authority to make this payment to the defendant for shares withdrawn, without authority of the board of directors. Even if the company had been solvent, he had no such authority. The directors themselves could not properly make such a payment while the corporation was insolvent.

As a member of the society the defendant was charged with knowledge of the by-laws. The only by-law in reference to the withdrawal of money by stockholders, on account of their stock, gave the manager and the president, acting jointly, authority to permit a stockholder to withdraw a sum not exceeding \$10, and to submit the matter to the directors at the next meeting. Evidence was admitted, subject to the exception of the defendant, that, in all cases of the withdrawal of sums greater than \$10 previous to this payment to the defendant, an application was made, and the withdrawal was authorized by an express vote of the directors before the money was paid out. Upon the defendant's contention that the manager had authority to make

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\* The jury found for the plaintiff in the sum of \$562.92; and the defendant alleged exceptions.

the payments to him by virtue of his position as the representative of the company this evidence was competent.

The vote of the stockholders in January, 1895, to add an "amendment to the by-laws that no person be allowed to hold more than \$400 in stock of the society," coupled with the fact that "from that time down to the date of the adjudication that the society was bankrupt in 1903, various shareholders held shares in excess of \$400 with the knowledge and consent of the society," did not enlarge the defendant's rights in reference to the withdrawal of his shares, nor make him a creditor for the amount invested above the sum of \$400.

In view of the instructions to the jury and the special findings, it is unnecessary to consider the requests for instructions more particularly.

*Exceptions overruled.*

*W. C. Ford*, for the defendant.

*H. R. Dow*, for the plaintiff.

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## CORNELIUS O'LEARY vs. HAVERHILL AND PLAISTOW STREET RAILWAY COMPANY.

Essex. November 9, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Negligence.*

In an action against a street railway company for personal injuries from being struck by an electric car of the defendant while the plaintiff was at work in the employ of the city where the accident occurred, assisting in macadamizing a street of that city, the plaintiff testified that when struck by the car he was working at a distance of two feet from the tracks, that two or three seconds before the accident he had looked for a car coming and saw none although the track was visible for twelve hundred feet, that he was listening for the noise of an approaching car but heard none, and that no bell or gong was sounded. Other witnesses testified that the plaintiff apparently was in a safe place, and that they heard no car coming. There was evidence for the defendant on which it could have been found that just before the plaintiff was hit he changed his position by stepping nearer to the car and that if he either had looked or had listened he would have seen or heard the car coming. *Held*, that the question of the plaintiff's due care was one for the jury.

TORT for personal injuries from being struck by an electric street car of the defendant on October 24, 1903, at about 1.15 o'clock P. M. while the plaintiff was at work in the employ of the city of Haverhill assisting in macadamizing Main Street in that city. Writ dated January 16, 1904.

In the Superior Court the case was tried before *Schofield, J.* At the close of the evidence the defendant asked the judge to rule that the plaintiff could not recover and the verdict must be for the defendant, that the plaintiff did not exercise due care and that it did not appear that the defendant was guilty of negligence. The judge refused to rule as requested, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$750. The defendant alleged exceptions. The only question argued before this court was whether there was evidence for the jury that the plaintiff was in the exercise of due care at the time of the accident. The facts which are held by the court sufficient to constitute such evidence are stated in the opinion.

*S. W. Emery*, for the defendant.

*W. J. McDonald & J. P. Sweeney*, for the plaintiff.

SHELDON, J. Although the question was a close one, we are of opinion that the case rightly was submitted to the jury.

1. There was evidence that the plaintiff was in the exercise of due care. He testified that when struck by the car he was working at a distance of two feet from the tracks, which ordinarily would be a safe place; that he had looked two or three seconds before for a car coming and saw none, although the track was visible for twelve hundred feet; that he was listening for the noise of an approaching car but heard none; and that no bell or gong was sounded. Other witnesses testified that he was apparently in a safe place when struck, and that they heard no car coming. Doubtless the jury well might have found that he changed his position by stepping nearer to the car just before he was hit, and that he would have seen or heard the car coming if he had either looked or listened; but we cannot pass upon the weight of the evidence. The cases in which the conduct of a plaintiff attempting to pass over a grade crossing of a steam railroad was considered are not applicable here; and the circumstances that were decisive in *Saltman v. Boston Elevated Rail-*

way, 187 Mass. 243, *Donovan v. Lynn & Boston Railroad*, 186 Mass. 583, and *Quinn v. Boston Elevated Railway*, 188 Mass. 473, do not exist in this case.

2. The defendant did not contend at the argument that the question of the negligence of its servants was not properly left to the jury.

*Exceptions overruled.*

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HARRIET F. KUHLEN vs. BOSTON AND NORTHERN STREET  
RAILWAY COMPANY.

Essex. November 9, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Carrier, Of passengers. Negligence. Street Railway. Subway. Evidence.*

It is the duty of a common carrier of passengers to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of the high degree of diligence and care toward its passengers to which such a carrier is held, it reasonably ought to have anticipated.

In an action by a woman against a street railway company for personal injuries incurred while entering as a passenger a car of the defendant at a station in a subway through which the defendant had a right to operate its cars by permission of the lessee of the subway, if it appears that the injuries of the plaintiff were due to the surging and struggling of the crowd in attempting to get on the car, and there is evidence that at the time of day when the accident occurred there usually was a large crowd in this subway station, and that on many previous occasions there had been the same surging and struggling to get upon the cars as occurred at this time, the jury are justified in finding that the defendant and its servants ought to have anticipated what actually took place and in the exercise of necessary care ought to have taken precautions to give the plaintiff the degree of protection to which she was entitled.

In the trial of an action against a street railway company for personal injuries incurred while entering as a passenger a car of the defendant at a station in a subway through which the defendant had a right to operate its cars by permission of the lessee of the subway, if it appears that the injuries to the plaintiff were due to the surging and struggling of the crowd at an hour when a crowded condition of the station was usual, it is a question for the jury, whether, if in carrying on the defendant's business the crowding of the station platforms and cars at certain hours of the day was unavoidable, the high degree of care which it was bound to exercise toward its passengers did not require as a reasonable precaution the employment of an increased number of men to prevent such jostling and crowding at the entrance of the cars as involved danger to passengers.

At the trial of an action by a woman against a street railway company for personal



injuries incurred in entering as a passenger a car of the defendant at a station in a subway through which the defendant had a right to operate its cars by permission of the lessee of the subway, if it appears that the injuries of the plaintiff were due to the surging and struggling of the crowd at an hour when a crowded condition of the station was usual, and if it further appears that the plaintiff had been in similar crowds at the same station before, had seen the same pushing and struggling and the same failure of the defendant to control the assemblage, and on former occasions had escaped injury so narrowly that in testifying she said "Many a night I have almost got killed," this is evidence to be considered by the jury in passing upon the questions whether the plaintiff was in the exercise of due care and whether she assumed the risk of such an accident as happened to her, but the fact that with the knowledge gained by her experience she joined the general rush to get into the car is not conclusive against her as matter of law upon either of these issues.

At the trial of an action against a street railway company for personal injuries incurred while entering as a passenger a car of the defendant at a station in a subway, the defendant, for the purpose of showing the conditions of its occupation of the subway, offered in evidence an agreement in writing between its predecessor in title and the Boston Elevated Railway Company, by which it contended that it would appear that the subway and the stations in it were constructed by the Boston Transit Commission and were owned by the city of Boston, that the platform at the station where the accident occurred was of the same width and in the same condition as when constructed by the commission, that the Boston Elevated Railway Company operated its cars in the subway under a lease of the subway, that the defendant operated its cars there under permission of the elevated railway company authorized by the Legislature, and that the elevated railway company had the entire management, charge and control of the subway, the stations and platforms, except that it could make alterations therein only by the permission of the Boston Transit Commission. The judge excluded the agreement. The agreement related principally to the pecuniary relations between the parties, but contained a provision that the cars of the defendant's predecessor in title while on the tracks in the subway should be subject to "the rules of the elevated railway company and the reasonable directions of its officials." There was no offer to show what rules, if any, had been established by the elevated railway company, or what "reasonable directions," if any, had been given to the defendant, nor was there any offer to show that the defendant had not been given full power to make whatever police arrangements might be necessary for the proper supervision of any expected crowds of passengers. It was conceded at the trial that the defendant held out the station where the accident occurred as a proper place for its passengers to go to for the purpose of taking its cars. *Held*, that, the plaintiff having gone to the station by the defendant's invitation, the defendant could not be injured by the exclusion of the agreement; that the details of the agreement did not appear to be material to the issues raised at the trial, and its effect if admitted might have been to distract the attention of the jury from the true issues of the case; so that there was no error in its exclusion.

TORT for personal injuries, originally against the Boston Elevated Railway Company and the Boston and Northern Street Railway Company. At the trial the plaintiff discontinued against the Boston Elevated Railway Company and prosecuted

her case against the Boston and Northern Street Railway Company alone. Writ dated May 19, 1903.

The plaintiff in her amended declaration alleged in substance that on February 18, 1903, she was injured while a passenger in and upon the defendant's premises at the Scollay Square subway station in Boston; that the defendant owned or controlled a station there and that on February 18, 1903, the plaintiff entered that station to take passage on one of the defendant's cars, purchasing and paying for a ticket at the time of entering the station; that the defendant neglected to provide safe and suitable entrances, exits, passages, guards and platforms for passengers, allowed the platform to be overcrowded and obstructed, wholly neglected to take such reasonable precautions as would insure to passengers and those entering such station and cars by invitation of the defendant safe and suitable access to the cars; whereby the plaintiff, being a passenger there by the invitation of the defendant and while in the exercise of due care, by reason of the neglect of the defendant was violently pushed and thrown down upon the steps of the car and was injured about the body and arms and sustained severe internal injuries.

In the Superior-Court the case was tried before *Bell, J.* It was in evidence that the plaintiff lived in Lynn and worked in Boston, and for three months previous to the accident had been accustomed to take a Lynn and Boston car at the subway station at Scollay Square at about six o'clock P. M.; that on February 18, 1903, the day of the accident, in accordance with her custom, the plaintiff paid her fare, entered the subway station at Scollay Square, got upon the car of the defendant and travelled upon it to Lynn; that at the time she entered the car there was a crowd in the subway station, some of whom did not succeed in getting into the car which the plaintiff boarded; that it was a stormy night and the car was fifty minutes late; that the motorman was on the car at least within the car's length from the place of the accident and that he knew nothing about it.

There was no evidence that anybody connected with the defendant saw the accident or saw the plaintiff until she was aboard or in the aisle of the defendant's car. There was no evidence that anybody connected with the defendant said anything or did anything to prevent the accident except that the conductor

in the vestibule of the car said two or three times, "Don't crowd."

It was in evidence that usually at this time of day there was a crowd in the subway station at Scollay Square and that the Lynn and Boston car leaving the subway at this time of day was unusually crowded; that when the Lynn and Boston car came into the subway station and came to a stop the plaintiff was in the front of the crowd near the edge of the platform where she had been waiting for the car for forty or fifty minutes; that the entire platform was very much crowded and was filled back to the stairs in the subway; that as the car of the defendant came in the plaintiff was pushed toward the rear of the car and the edge of the platform; that as the plaintiff was pushed toward the car she put a small parcel under her arm and a bag on her wrist so that her right hand would be free and she could take care of herself; and that the plaintiff was pushed in the back just like a hammer.

One Ober, a witness for the plaintiff who did not know her, testified that as the car came in the plaintiff was being pushed toward him and toward the rail to the rear of the car, and he thought she would have been pushed over on the rail if he had not put his hand up in front of her and helped her as she was on the platform two or three feet from the rear of the car and close to the edge of the platform; that the car already had stopped; that the witness did not let go of the plaintiff but helped her to the step on the rear of the car.

It further appeared by the bill of exceptions that the plaintiff got upon the first step of the car from the platform of the subway; that when the plaintiff was on the lower step her right hand was on the rail or iron against the rear of the car; that the plaintiff "hollered out" — "you are hurting me"; that at this moment the plaintiff was pushed so that she was helpless; that her knees dragged the other step; that the conductor was standing there and never said a word; that the plaintiff finally was pushed and pushed until she got pushed right into the car; that in the meantime her hand was right on the rail; and that the conductor was leaning on the motor and laughing. The plaintiff knew there always had been such a crush and struggle and that she would have to be particularly careful, that there would be

sure to be a big crush. The plaintiff testified that there were people in front of her and back of her; that she "was nailed, carried almost"; that the plaintiff was pushed into the car, and a lady got up and gave her seat to the plaintiff; that there was no one to direct passengers and there was no turnstile; that as she went into the subway there was a large crowd; that she had to wait fifty minutes for her car by reason of the cars being late on account of the snow; that during that time the crowd was constantly growing larger so that when the car arrived the crowd was unusually large; that there was nobody there directing the people; that nobody raised his hand and asked the people not to push; that the crowd was surging and pushing violently when the Lynn car arrived. The plaintiff finally was shoved into the aisle of the car in a fainting condition with an injury that proved to be a fracture of the right wrist.

Other evidence is stated or described in the opinion.

At the close of the evidence the defendant asked the judge to give the following instructions to the jury:

1. On all the evidence the plaintiff is not entitled to recover.
2. The plaintiff was not in the exercise of due care.
3. There is no evidence of negligence of the defendant, its servants or agents.
4. The plaintiff assumed the risk of being jostled and all danger and inconvenience incident thereto when she entered into the crowd endeavoring to get upon the car.
5. In choosing to travel on a street car when the same was crowded, the plaintiff assumed the risk of injury incident to such crowding.
7. If it is not practicable for the defendant to carry on its business without the crowding of its platforms and cars at certain hours of the day, it is not negligence on the part of the defendant to fail to employ a large force of men at those hours to prevent jostling and crowding at the entrance to the cars.

The judge refused to give any of these instructions, and gave other instructions which were printed in the bill of exceptions. The jury returned a verdict for the plaintiff in the sum of \$2,000; and the defendant alleged exceptions to the refusal of the judge to give the instructions requested and to the judge's charge so far as inconsistent with these instructions, and also to the exclu-

sion by the judge of an agreement between the Boston Elevated Railway Company and the Lynn and Boston Railroad Company, to whose rights the defendant had succeeded. This agreement is described sufficiently in the opinion.

*S. Parsons*, for the defendant.

*F. D. Allen*, (*W. B. Murphy* with him,) for the plaintiff.

SHELDON, J. It is the duty of the defendant, as a carrier of passengers for hire, to use the highest degree of care consistent with the nature and extent of its business, not only to provide safe and suitable vehicles for their carriage, but to maintain all such reasonable arrangements for control and supervision both of the passengers and of its own servants as prudence would dictate to guard its passengers, while they occupy that relation, against all dangers that are naturally and according to the usual course of things to be expected. It is bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of vigilance and care to which it is held, it ought reasonably to have anticipated. This is the unvarying doctrine of our own decisions. *Treat v. Boston & Lowell Railroad*, 131 Mass. 371. *Commonwealth v. Coburn*, 132 Mass. 555. *Bryant v. Rich*, 106 Mass. 180. *Dodge v. Boston & Bangor Steamship Co.* 148 Mass. 207. And its duty to use all proper means and precautions to protect its passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is no less stringent than the obligation to prevent misconduct or negligence on the part of its own servants. *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.* 97 Mass. 361. *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528. "There is no doubt of the duty of a railroad company to use all such means and precautions as are reasonably practicable for the protection and safety of its passengers, not only from the misconduct of its agents and servants but also of other passengers and of other persons who are not passengers." *Allen, J. in Brooks v. Old Colony Railroad*, 168 Mass. 164, 165. In *United Railways v. Deane*, 93 Md. 619, it was held in an elaborate opinion that a passenger on a street railway car could hold the railway company liable for an assault committed upon him by a drunken

and disorderly passenger who had once been put off the car but afterwards had been allowed to get on again and ride without hindrance; and this upon the general ground that when the servants of a carrier know or have the means of knowing that a disorderly passenger is likely to commit an assault, it is their duty to eject him, as in *Vinton v. Middlesex Railroad*, 11 Allen, 304, and their employer is liable for their neglect of this duty if it results in injury to another passenger. McSherry, C. J., said in this case: "It is just as incumbent on the carrier to protect all his passengers from assault by a fellow passenger when his servants have knowledge or the means of knowing that an assault on some one is imminent and when they have time and means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation." The same general doctrine has been maintained in other jurisdictions, so far as we are aware without exceptions. *Muhlhouse v. Monongahela Street Railway*, 201 Penn. St. 237. *Pittsburg & Connellsville Railroad v. Pillow*, 76 Penn. St. 510. *McGearty v. Manhattan Railway*, 15 App. Div. (N. Y.) 2. *Pittsburg, Fort Wayne & Chicago Railway v. Hinds*, 53 Penn. St. 512. *Flint v. Norwich & New York Transportation Co.* 34 Conn. 554; *S. C.* 6 Blatchf. 158; 7 Blatchf. 536, and 18 Wall. 3. *New Orleans, St. Louis & Chicago Railroad v. Burke*, 53 Miss. 200. Other cases bearing on the same subject are cited by Loring, J. in *Jacobs v. West End Street Railway*, 178 Mass. 116, 118. The cases of *Thomson v. Manhattan Railway*, 75 Hun, 548, *Putnam v. Broadway & Seventh Avenue Railroad*, 55 N. Y. 108, *Ellinger v. Philadelphia, Wilmington & Baltimore Railroad*, 153 Penn. St. 218, *Graeff v. Philadelphia & Reading Railroad*, 161 Penn. St. 230, and *Cornman v. Eastern Counties Railway*, 4 H. & N. 781, relied upon by the defendant, either turn upon the proposition that as a common carrier can be held liable for injury done by one passenger to another only upon proof that it has failed to discharge its duty of using the utmost vigilance to maintain order and guard against violence, so it must be shown that the circumstances which called for special action either were known or in the exercise of proper care ought to have been known to the defendant or its servants, or else lay down the rule (perhaps sometimes carried too far) that the carrier is not to be held

liable for a mere breach of courtesy from one passenger to another.

There was evidence that there was usually a large crowd in the subway station at this time of the day; that there had been on many previous occasions the same surging and struggling to get upon the car as occurred at this time; and the jury had a right to find, as under the careful instructions of the court they must have found, that the defendant and its servants ought to have anticipated just what actually did take place, and ought in the exercise of the necessary care to have taken reasonable precautions to guard against such injuries as were caused to the plaintiff, and that they were negligent in failing to take such precautions and to give to the plaintiff that degree of protection which she had a right to expect from them. It follows that the defendant's third request for instructions was rightly refused.

Nor could its seventh request have been given. It was for the jury to say whether or not, if the crowding of its platforms and cars at certain hours of the day was unavoidable in carrying on its business, that high degree of care which it was bound to exercise called for the employment of an increased number of men to prevent such jostling and crowding at the entrance of the cars as would involve danger to passengers, and whether or not it was reasonable, in view of the nature and extent of the defendant's business, to require this precaution to be taken.

It could not have been said as matter of law that the plaintiff herself was not in the exercise of due care, or that she had assumed the risk of the injury that was done to her. She had been in similar crowds before, had seen the same pushing and struggling and the same failure on the part of the defendant to control the assemblage; and she had formerly so narrowly escaped injury that she said in testifying: "Many a night I have almost got killed." With the knowledge gained by this experience, however, she joined in the general rush to get into the car. All these circumstances were important to be considered by the jury in passing upon the question of her due care; and their attention was called to these circumstances by the presiding judge in his charge. But they are not conclusive against her as a matter of law. The jury might say that in spite of the

failure of the defendant's servants and agents to control the crowd on previous occasions she might depend somewhat on the hope that they would not continue to fall short of their duty. And it is hard to see how the same circumstances which simply require the question of the defendant's negligence to be left to the jury can be conclusive as against the plaintiff to show either that she was negligent or that she assumed the risk. We think that these questions also were for the jury. *Treat v. Boston & Lowell Railroad*, 181 Mass. 871. *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.* 97 Mass. 361. *Gaynor v. Old Colony & Newport Railway*, 100 Mass. 208. Accordingly the defendant's first, second, fourth and fifth requests could not have been given.

The subway and this station were built by the Boston Transit Commission, which alone had the power to make or authorize any change therein, and were the property of the city of Boston. The defendant's occupation thereof was either under a lease or merely permissive. St. 1894, c. 548, §§ 23 *et seq.* St. 1897, c. 500, §§ 5, 12. See *Falkins v. Boston Elevated Railway*, 188 Mass. 153; *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14. For the purpose of showing the conditions of its occupation of the subway, the defendant offered in evidence a written agreement between the Boston Elevated Railway Company, the lessee of the subway, and the Lynn and Boston Railroad Company, to whose rights the defendant has succeeded; and the only remaining question arises upon the defendant's exception to the exclusion of this agreement, a copy of which is annexed to the bill of exceptions. The defendant refers to the fact that in the case last cited it appeared by the agreement of the parties "that the subway and the stations in it were constructed by the Boston Transit Commission, and are owned by the City of Boston; that the platform at this station is now of the same width and in the same condition as constructed by the Transit Commission; that the Boston Elevated Railway Company operates its cars in the subway under a lease of the subway, and that the defendant operates its cars therein under permission of said elevated company authorized by the Legislature; that the elevated company has the entire management, charge and control of the subway, the stations and platforms,



except that it can make alterations therein only by the permission of the Boston Transit Commission." *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14, 16, 17. The defendant contends that this agreement, if it had been admitted, would have proved in the case at bar the same facts which were agreed upon in that case, and says that it had no control or management of the station and could not have limited the number of persons admitted thereto.

The main purpose of this agreement appears to have been to determine the amount of money to be paid by the defendant for its use of the subway, and to regulate the other pecuniary relations between the parties. The thirteenth clause however provides "that the cars of said Lynn and Boston Company while on the tracks of or leased to the Elevated Company either within the subway or without, shall be subject to the rules and regularities [*sic*] of said Elevated Company and the reasonable direction of its officials." There was no offer to show what "reasonable directions," if any, had been given to the defendant or what rules, if any, had been established by the elevated company. Nor was there any offer to show that the defendant had not been given full power to make whatever police arrangements might be necessary for the proper supervision of any expected crowds of passengers; and if the defendant had such power, it could be held liable under the circumstances of this case. In view of the fact, which appears to have been conceded at the trial, that the defendant held this out as the proper place for its passengers to come to for the purpose of taking its cars, so that its passengers had a right to regard themselves as having come thither by its invitation, we do not see that the defendant was injured by the exclusion of this agreement. The general principle has been established that one who, though not strictly in control of a defective thing or dangerous place, yet uses it for his own benefit or for his own purposes invites another to enter it, may, if other elements of liability concur, be held responsible to the latter for an injury caused by the defect or danger. *Heaven v. Pender*, 11 Q. B. D. 508. *Poor v. Sears*, 154 Mass. 539. *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216, 218. *Cotant v. Boone Suburban Railway*, 125 Iowa, 46. The details of this agreement do not appear to have been at all

material to the issues raised at the trial. The effect of admitting the agreement might have been to distract the attention of the jury from the real issues of the case. We find no error at the trial.

*Exceptions overruled.*

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UNITED SHOE MACHINERY COMPANY vs. HERBERT L.  
KIMBALL & another.

Essex. November 9, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Contract, Validity. Sale, Of good will. Fraud. Good Will. Equity Jurisdiction, To enforce negative contract. Equity Pleading and Practice, Appeal.*

In a suit in equity by a manufacturer of shoe machinery, conducting business in all parts of the world where shoes are made by machinery, against a manufacturer of certain articles used in manufacturing shoes, who had been engaged in that business in a city in this Commonwealth and had sold out his business and its good will to the plaintiff with a covenant not to manufacture or deal in the articles formerly made by him for a period of fifteen years, to enforce by injunction the negative covenant of the defendant, if the defendant relies on the defence that the sale and the covenant were procured by fraud on the part of the plaintiff, and the only evidence in support of this defence is that there had been competition between the plaintiff and the defendant in the sale of the kind of articles manufactured by the defendant and that the plaintiff's agent had told the defendant what difficulties he would encounter in conducting his business against the plaintiff's competition, a finding of the justice who heard the case that the matters relied on to show fraud were only such as legitimately might result from competition where each party was striving to obtain an advantage over the other by the usual methods of business, and that there was no fraud or mistake in the making of the sale and covenant, will not be disturbed on appeal.

The sale of a business carried on in a city in this Commonwealth, consisting of manufacturing and dealing in needles, awls, drivers and like articles used in manufacturing boots and shoes, to a corporation engaged in manufacturing and selling machinery and devices for manufacturing boots and shoes, including needles, awls, drivers and like articles and conducting this business in all parts of the world where shoes are made by machinery, expressly including the good will of the business sold with a covenant on the part of the seller not to engage in or be interested in any business which consists in whole or in part in manufacturing or dealing in needles, awls or drivers for a period of fifteen years and without restriction as to place, where the time limit has been found as a fact not to be unreasonable, is valid, and the seller's negative covenant will be enforced against him in equity.

**BILL IN EQUITY**, filed August 17, 1906, to restrain the defendants from carrying on the business of manufacturing and dealing in awls, needles, drivers and similar articles, and from having any interest therein, contrary to the terms of a covenant of the defendants contained in a contract which is printed below.

The contract was as follows:

“ Know all Men by These Presents:

“ That we, Herbert L. Kimball and Irving A. Hadley, both of Lynn, Massachusetts, heretofore engaged as copartners at said Lynn and elsewhere in the business of manufacturing and dealing in needles, awls, drivers, and similar articles under the firm name and style of Kimball & Hadley, in consideration of the sum of four thousand, seven hundred and fifty dollars (\$4750.00) in cash to us paid by the United Shoe Machinery Company, a corporation organized and existing under the laws of the State of New Jersey, having a place of business in Boston, Massachusetts, the receipt of which we hereby acknowledge, have sold and do by these presents sell, assign, transfer, set over and deliver to the said United Shoe Machinery Company, its successors and assigns, the said business heretofore carried on by us, together with the good-will thereof, and all business, good-will, property, interests and rights of every name and nature had by us or by either of us or which we or either of us is in anywise, by agreement or otherwise, entitled to acquire or take over relating to needles, awls, drivers, and like articles, including herein all merchandise, needles, awls, drivers, supplies, materials manufactured, unmanufactured or in process of manufacture, machines, machinery, tools, fixtures, furniture and equipment, the good-will of all such business, and all trade names, marks and brands, and all other property, interests and rights, benefits and advantages of whatsoever name or nature relating thereto; Excepting, However, that this assignment does not include any cash on hand or any bills, notes and accounts receivable.

“ To Have and to Hold all of the said business, good-will, property, interests and rights to the said United Shoe Machinery Company, its successors and assigns, to its and their own use and behoof absolutely.

“ And for the same consideration we and each of us do hereby covenant with and warrant to the said United Shoe Machinery

Company, its successors and assigns, that the property hereby conveyed includes all of the property set forth in the schedule hereto annexed and marked 'Schedule A'; that we are the absolute owners of all the business, good-will, property, interests and rights hereby conveyed or expressed or intended to be conveyed; that the same are free from any and all incumbrances; that we have good right to sell and assign the same as aforesaid, and will warrant and defend the same against the lawful claims and demands of all persons.

"And for the same consideration we and each of us do hereby covenant and agree to and with the said United Shoe Machinery Company, its successors and assigns, that at any and all times hereafter we and each of us will without further consideration execute and cause to be executed any and all further assignments or other instruments, and will perform and cause to be performed any and all further acts necessary or desired by the said United Shoe Machinery Company, its successors or assigns, to fully and completely vest and confirm in the said United Shoe Machinery Company, its successors and assigns, the full and absolute title in and to all the business, good-will, property, interests and rights, benefits and advantages hereby conveyed or expressed or intended to be conveyed, and to enable the said United Shoe Machinery Company, its successors and assigns, to secure, protect and enjoy the full benefits and advantages thereof.

"And for the same consideration we and each of us do hereby covenant and agree to and with the said United Shoe Machinery Company, its successors and assigns, that we will not nor will either of us at any time within fifteen (15) years from the date of these presents directly or indirectly, individually or in combination with others, as manager, agent or employee, or as officer or stockholder in a corporation, or otherwise, in any manner, enter into or be engaged or interested in or financially or otherwise assist any person, firm or corporation in entering into, developing or carrying on any business which consists in whole or in part of or relates to manufacturing or dealing in needles, awls or drivers.

"This sale shall take effect as of the close of business on the tenth day of June, A. D. 1904.

"In Witness Whereof we, the said Herbert L. Kimball and Irving A. Hadley have hereunto set our respective hands and seals, and have signed these presents in the name of the said partnership this eleventh day of June, A. D. 1904.

"Kimball & Hadley [seal]

By Herbert L. Kimball

Herbert L. Kimball [seal]

Irving A. Hadley" [seal]

The defendants demurred to the bill, and also filed an answer. The demurrer was overruled and the defendants appealed. The case was heard on the merits by *Loring, J.*, who made a final decree granting the relief prayed for; and the defendants appealed.

The justice made a memorandum of findings and rulings, beginning as follows:

"I think that the real trouble with these defendants is that they were met by competition. Take the statement on the stand of Mr. Kimball, one of the defendants. He said he did not want to sell his business. In a sense that was true. In another sense it was not true. In the sense that he had a business there that he would like to have pursued, if he could have pursued it without competition, I think that was true. In the sense that he was met with competition, and after due and mature consideration had come to the conclusion that he did not want to sell, it was not true. The defendants were met with competition. They thought over where the competition was going to put them, and made up their minds that the best thing they could do was to sell the good will of their business and their personal property to the United Shoe Machinery Company, and I think that they made the sale voluntarily."

Other material findings of the justice are referred to in the opinion. After referring to the evidence the memorandum of findings states: "So there was no fraud; there was no mistake, and there was no accident, about this contract that was entered into."

The justice refused to rule that the plaintiff had shown no right to the relief prayed for or to any relief.

In refusing requests to rule that if the plaintiff procured the execution of the covenant by means of threats or intimidation,

or by representations, or by threats or intimidation of an agent of the plaintiff, the covenant was void, the justice said:

"I find in this case as a fact that there were no illegal threats, and that there was no illegal intimidation on the part of the defendants. I refuse the ruling because I find in this case that there were, in fact, no illegal threats or illegal intimidation, and that it is not a fact that there were threats or intimidation which were illegal."

"So far as there were any representations made, it has not been shown by the defendants that the representations were false."

"I have found as a fact that all that the plaintiff did was to threaten to do what it had a legal right to do in competition."

The defendants also asked for the following rulings:

"6. The said covenant is void, as a matter of law, for the reason that the same is unlimited in its terms as to the space or territory covered thereby.

"7. The said covenant is void, as a matter of law, for the reason that the same is, upon its face, manifestly in restraint of trade.

"8. The said covenant is void, as a matter of law, because the period of time therein limited — fifteen years — is palpably excessive and unreasonable.

"9. The said covenant is void because same is not by its terms limited to the territory wherein the trade and business sold by the defendants to the plaintiff had been actually done and carried on."

The justice refused to make any of these rulings.

Requests for further rulings numbered 10 and 11 the justice disposed of as follows:

"10. The said covenant is against public policy and void because, as regards time, space, and the extent of the defendants' trade, sold to plaintiff, the said covenant was not limited to what was, at the time of the execution thereof, reasonable under the circumstances of the case,' — I think it was restricted to what at the time of the execution thereof was reasonable under the circumstances of the case, and for that reason I refuse that part of the request, — 'and because said covenant tends to deprive the public of the services of the defendants in the particular employment and capacity in which they are most useful, to wit, the

making of needles, awls, and drivers, and to expose the public to the evil of a monopoly in the manufacture of such articles by the plaintiff.' That part I refuse.

"11. The said covenant is void because, as a matter of law, it is unreasonable under the circumstances of the case, upon the facts as they shall be found by the court.' That I refuse."

*E. H. Hadley & J. W. Pickering*, for the defendants.

*W. B. Farr*, for the plaintiff.

KNOWLTON, C. J. The defendants were manufacturing and dealing in needles, awls, drivers and similar articles, and on June 11, 1904, they sold their business to the plaintiff. The plaintiff is a corporation engaged in the business of manufacturing and selling machinery and devices for manufacturing boots and shoes, including needles, awls and drivers, and other similar articles. The bill of sale from the defendants to the plaintiff included the business previously carried on by them, "together with the good-will thereof, and all business, good-will, property, interests and rights of every name and nature . . . relating to needles, awls, drivers, and like articles," etc. Besides other covenants of the defendants designed to effectuate the purpose of the parties, the instrument contained a covenant as follows: "And for the same consideration we and each of us do hereby covenant and agree to and with the said United Shoe Machinery Company, its successors and assigns, that we will not nor will either of us at any time within fifteen years from the date of these presents directly or indirectly, individually or in combination with others, as manager, agent or employee, or as officer or stockholder in a corporation, or otherwise, in any manner, enter into or be engaged or interested in or financially or otherwise assist any person, firm or corporation in entering into, developing or carrying on any business which consists in whole or in part of or relates to manufacturing or dealing in needles, awls or drivers." In the spring of 1906 the defendants established a business in Lynn where the business previously sold to the plaintiff was conducted, for the purpose of manufacturing and selling needles, awls and other articles like those which they were manufacturing when they made the sale. This suit was brought to enforce the covenant quoted above, by an injunction to prevent the defendants from carrying on the business so established.

The first defence relied on is that the instrument and the covenant contained in it were obtained by the fraud of the plaintiff. In reference to this contention the judge who heard the case found that "there was no fraud; there was no mistake, and there was no accident, about this contract that was entered into." A careful examination of the evidence, which was reported by a commissioner, shows that the only foundation for this contention is that there had been competition between the plaintiff and the defendants in the sale of needles, and that this was referred to by both parties in the course of the negotiations for the sale of the business, and that the plaintiff's agent told the defendants what difficulties they might encounter in conducting their business against the plaintiff's competition. The justice found that the matters referred to were only such as legitimately might result from competition while each party was striving to obtain an advantage over the other by the usual methods of business. In a case of this kind the findings of the single justice must stand unless they are plainly wrong. The evidence before us discloses no error in this finding.

The more important and difficult question is whether the covenant is invalid as being against public policy. The defendants contend that it is void because it is to continue in force for an unreasonably long time, and is unrestricted in space.

The testimony shows that considerably more than half of the consideration paid by the plaintiff was for the good will of the business, or to obtain relief from the competition of the defendants. It is not disputed that the business of the plaintiff is conducted in all parts of the civilized world where shoes are manufactured by machinery. Although the business carried on by the defendants was not large, it was of such a kind, and might be so extended, as to affect the market throughout this country and in other countries. The plaintiff made its purchase with a view to obtain the advantage of controlling the good will of this business in every part of the extended area in which it was itself selling needles. It might derive profit from the ownership of this good will, either affirmatively through the sale of articles of recognized merit, as a successor to the defendants in their business, or negatively through freedom from the competition which previously had diminished its own profits, and which



later might diminish them much more. These are considerations bearing upon the reasonableness of such a covenant in connection with the sale of a business and its good will to the proprietor of a competing business.

The law on this point, as laid down in early times, has been materially changed by recent decisions. Formerly it seems to have been held that a provision for a general restraint of any person in his trade was necessarily invalid. But in this Commonwealth and in other jurisdictions this is no longer the law. The subject was considered and many of the cases were referred to in *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, in which there is this statement of the law: "In connection with the sale of the good will of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. . . . In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold." Under this rule, in conceivable cases, a covenant may be valid which is unlimited both in time and space. This is held by a unanimous decision of the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535. The reasoning in the later American cases leads to the same result. *Leslie v. Lorillard*, 110 N. Y. 519. *Wood v. Whitehead Brothers Co.* 165 N. Y. 545. *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409. *Oakdale Manuf. Co. v. Garst*, 18 R. I. 484. *Bancroft v. Union Embossing Co.* 72 N. H. 402. *National Enameling & Stamping Co. v. Haberman*, 120 Fed. Rep. 415.

The value of a business with its good will may be enhanced to a purchaser by the fact that its competition is detrimental to a business conducted by him. A considerable part of the price paid may represent the value to the purchaser of relief from the interference of the vendor as a competitor. The mere fact that a contract looks to the withdrawal of the competition of one of the parties to it does not render the contract invalid. Ordinarily, with the present methods of conducting business and the freedom of communication between centres of trade and industry, such a contract does not create a monopoly, to the danger of the general public. An owner of a business, who can sell it for a large price in connection with a promise not to compete with

the purchaser of it, should not be precluded from obtaining its value. The value of the right to make contracts freely is a very important consideration in determining questions of public policy. *Leslie v. Lorillard*, 110 N. Y. 519. *Wood v. Whitehead Brothers Co.* 165 N. Y. 545. If it appeared that such a contract was made with a purpose to obtain a monopoly, and would have a direct tendency to that result, it would be looked upon with less favor. On the evidence in the present case this does not appear. But one legitimately may try to diminish competition in his own field, and may make reasonable efforts to enhance his profits by energy and enterprise as a pioneer where others only tardily follow.

In the present case the justice who heard the witnesses found that the relations of the respective parties to the business sold were such that the time limit was not unreasonable, and that the general covenant as to place was such as the defendants properly might make, for a valuable consideration, to accomplish the purpose shown in the contract. We cannot say that he was wrong in his conclusion.

*Decree affirmed.*

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LAFAYETTE J. LADD vs. NEW YORK, NEW HAVEN, AND  
HARTFORD RAILROAD COMPANY.

Suffolk. November 13, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Railroad. Carrier, Of goods.*

It is the duty of a railroad company as a common carrier of goods to provide a safe and proper place for their delivery, and, if in transporting a car load of hay it chooses to deliver the hay from the car while standing on a track in its freight yard instead of unloading the car and delivering the hay at its freight house, it is bound to keep the car in a safe condition for the use of the persons employed by the owner of the hay to take it out.

If a railroad company receives a car belonging to another company loaded with goods for transportation over its road, and on the arrival of the car at its destination leaves it standing on a track in one of its freight yards and directs the owner of the goods to unload them from the car at that place, it has made the car one of its appliances for which it is responsible; and the fact that the car is the property of another is immaterial as affecting its duty to keep the car in a safe condition for the delivery of the goods.

In an action against a railroad company by a teamster sent by his employer, who had purchased a car load of hay, to help in unloading the hay from the car, and injured by a defective door of the car which fell upon the plaintiff as he was trying to open it, there was evidence that the car had been placed on a track in a freight yard of the defendant for the purpose of being unloaded by the purchaser of the hay who had been directed by the yard clerk of the defendant to unload it at that place, and that two or three days before the happening of the accident the plaintiff's employer went to the car to remove some of the hay and found that the door was defective, whereupon he notified the yard clerk that the car was in bad order. The defendant contended that the proximate cause of the accident was the negligence of the plaintiff's employer who, having full knowledge of the existing defect, sent the plaintiff to unload hay from the car and failed to give him any warning in regard to it. *Held*, that, apart from the question whether the defect in the car was a latent one or whether it could have been discovered by a proper inspection, as to which no opinion was expressed, there was evidence warranting a finding that the defendant's yard clerk after due notice from the plaintiff's employer failed to make any proper examination of the car or the door, and that the defendant was negligent in not having remedied the defect or having done something to guard against injury resulting from its existence, there having been other evidence in the case from which the jury might have found, irrespective of the notice from the plaintiff's employer, that the defendant had had a sufficient opportunity to discover and remedy the defect or to guard against injurious consequences resulting from it before using the car as a place of delivery; and that, the defendant having invited the plaintiff's employer and the plaintiff as his employee to come to the car to remove the hay therefrom, the plaintiff's employer owed no duty to the defendant to warn the plaintiff of the danger to be apprehended if, as turned out to be the case, the defendant should neglect to repair the defect to which he had called the attention of its servant.

TORT by a teamster in the employ of one Robinson for injuries from a defective door of a car standing on a track in a freight yard of the defendant in that part of Boston called South Boston falling upon the plaintiff, when the plaintiff with one Harris had been sent with a team by Robinson to complete the unloading of hay from the car and was helping to open the door of the car for that purpose. Writ in the Municipal Court of the City of Boston dated November 9, 1904.

On appeal to the Superior Court the case was tried before *Maynard, J.* It appeared that the car in question belonged to the Lehigh Valley Railroad Company and was received from that company by the defendant in the city of New York loaded with hay consigned to one Bates of Boston, who sold the hay to Robinson. On the arrival of the car in Boston it was placed in the defendant's yard No. 5, and six days later at the request of Robinson was shifted from that yard to yard No. 3 where it

was placed on track 12. Two or three days before the accident, Robinson with the plaintiff and Harris went to the yard with teams to take the hay from the car. There Robinson, as was the custom of the yard, called upon one Sullivan, the yard clerk of the defendant, and was directed by him to the place where the car stood. Robinson at that time found that the door was defective and in opening it got under the door to steady it so that it would not fall on him. On leaving, he notified Sullivan that the car was in bad order. Harris testified that on the day of the accident he was sent for hay; that he backed the team to the door and used the hook to start the door; that the plaintiff was on the ground and took hold of the handle of the door and pulled and the door fell on top of him; that he, Harris, only started the door and that it went freely when once started.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*F. E. Shurtleff*, for the plaintiff.

*F. W. Knowlton*, for the defendant.

SHELDON, J. In our opinion the jury might have found upon the evidence that upon the arrival of the car in Boston the defendant, instead of unloading the car and delivering the hay at its freight house, chose to make delivery from the car itself, and that this was the reason for the defendant's keeping the car unloaded in one of its yards for six days before shifting it, at the request of Robinson, the purchaser of the hay and the employer of the plaintiff, into another place. If the jury found that this was the fact, then the defendant, by adopting the car as the store house from which Robinson was to take the hay, invited him and his men to come thither and there unload the hay. It made the car its temporary freight house, which, so far at any rate as could be accomplished by the exercise of ordinary care, it was bound to keep in a safe condition for the use of those men who should properly come to take out the hay which it contained. *Bachant v. Boston & Maine Railroad*, 187 Mass. 392. *Foster v. New York, New Haven, & Hartford Railroad*, 187 Mass. 21. As was said by Braley, J., in *Bachant v. Boston & Maine Railroad*, *ubi supra*, "under its contract as a common carrier the defendant was required to provide a safe and proper place for delivery."

It is not material that this car was, as in *Foster v. New York, New Haven, & Hartford Railroad*, *ubi supra*, the property of another. By adopting and using it for its own purposes, as might have been found to be the fact, the defendant had made it one of its own appliances, of which it had assumed full control and for which it was responsible as for its own property. *Bowers v. Connecticut River Railroad*, 162 Mass. 312. *Fletcher v. Boston & Maine Railroad*, 1 Allen, 9. *Schopman v. Boston & Worcester Railroad*, 9 Cush. 24. *Cotant v. Boone Suburban Railway*, 125 Iowa, 46. *Combe v. London & South-Western Railway*, 31 L. T. (N. S.) 613. It was the defendant and not the general owner of the car that furnished this car to Robinson's men, including the plaintiff, and that was responsible for its condition. *Hale v. New York, New Haven, & Hartford Railway*, 190 Mass. 84. *Glynn v. Central Railroad*, 175 Mass. 510. *Spaulding v. Flynt Granite Co.* 159 Mass. 587. The car had passed out of the control of its general owner, and the defendant was using it for its own purposes. *Caledonian Railway v. Mulholland*, [1898] A. C. 216. The cases which consider the rule that, as to cars which one railroad company receives from another for transportation over its line, it owes no other duty to its employees than that of providing a sufficient number of competent inspectors, have no application to this case, and need not be referred to.

There was also evidence that the defendant had been negligent in the performance of its duty. Entirely apart from the question whether the defect in this car was a latent defect or whether it could have been discovered by a proper inspection, as to which we express no opinion, there was evidence that two or three days before the happening of the accident the plaintiff's employer had notified Sullivan, one of the defendant's servants, that the door of this car was in bad condition, but that nothing was done by the defendant to remedy the defect until after the accident; and the jury might have found that Sullivan, after due notice by the plaintiff's employer, failed to make any proper examination of the car or the door. In view of the duty resting upon the defendant which already has been stated, we are of opinion that the jury might have found that it was guilty of negligence in not having discovered the defect and either reme-

died it or done something to guard against injury resulting from its existence. And there was other evidence from which the jury might have found, irrespective of the notice received as aforesaid, that the defendant had had sufficient opportunity to discover and remedy the defect or to guard against injurious consequences resulting from it, before electing to use it as a place of delivery.

The defendant does not deny that there was evidence for the jury that the plaintiff was in the exercise of due care; but it strenuously contends that, even if negligence of the defendant had been found, yet that negligence was not the direct and proximate cause of the plaintiff's injury. It relies upon the well settled doctrine that although its own negligent failure to discover and remedy the defect in this car may have been the original cause without which the injury to the plaintiff would not have happened, yet if between its own negligence and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff, then the defendant cannot be held liable. It is true that the general rule is to look no further back than to the last wrongdoer, especially when he has had complete and intelligent control of the consequences of the earlier wrongful or negligent acts. *Murray v. Boston Ice Co.* 180 Mass. 165. *Stone v. Boston & Albany Railroad*, 171 Mass. 536. And see the cases cited in these opinions. The defendant contends that the injury to the plaintiff is due directly to the negligence of Robinson his employer in putting the plaintiff to work upon this car, having himself a full knowledge of the existing defect and danger, and failing to give to the plaintiff any warning thereof. *Spaulding v. Flynt Granite Co.* 159 Mass. 587. But this argument overlooks the fact which, as we have seen, the jury might have found, that the defendant had itself invited not only Robinson but his men, including the plaintiff, to come to this car and remove the hay therefrom. In this respect the case resembles *Heaven v. Pender*, 11 Q. B. D. 503, and *Robertson v. Boston & Albany Railroad*, 160 Mass. 191, 193. Robinson owed no duty

to the defendant to warn his servants of the danger to be apprehended if, as turned out to be the case, it should neglect to repair the defective condition to which he had called the attention of its servant. *Poor v. Sears*, 154 Mass. 539, 549. Robinson's original duty to the plaintiff was no greater than was found in *Dunn v. Boston & Northern Street Railway*, 189 Mass. 62. So far as it may have been increased by his actual knowledge of the existence of the defect and danger, this must be considered in connection with the notice which he had given to the defendant and the opportunity which the defendant had had to make proper repairs. The jury might have found that the defendant's negligence continued up to the time of the injury to the plaintiff, and that the defendant was itself the last wrongdoer both in point of time and in the chain of causation.

In our opinion, the case should have been submitted to the jury.

*Exceptions sustained.*

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FRANCIS C. WELCH, trustee, vs. GEORGE R. SWASEY  
& others.

Suffolk. November 13, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & BRALEY, JJ.

*Constitutional Law, Police power, Delegation of legislative power. Boston. Municipal Corporations. Mandamus.*

The Legislature in the exercise of the police power can limit the height of buildings in a city in which they determine that the public health or the public safety requires such a limitation.

In a city in which the Legislature have determined that the public health or the public safety requires the limitation of the height of buildings they may establish different heights for different neighborhoods according to their conditions and the uses to which the property in them is put.

In a city in which the Legislature have determined that the public health or the public safety requires the limitation of the height of buildings, it is reasonable to allow buildings to be constructed to a greater height in those parts of the city where most of the buildings are used for purposes of business or commerce than in those parts where most of the buildings are used for residences, even if some of the streets in the business portion of the city are narrower than those in the residential portion.

*Semble*, that, although the Legislature have no power to restrict the uses of private property for purely aesthetic purposes, yet when they have determined that the public health or the public safety requires the limitation of the height of buildings in a city, in exercising the police power for such lawful purposes they also may consider questions of taste and beauty.

The provisions of St. 1904, c. 333, that the city of Boston shall be divided into districts of two classes, in one of which all or the greater part of the buildings are used for business or commercial purposes, and in the other of which all or the greater part of the buildings are used for residential purposes or for other purposes not business or commercial, that in the first district no building shall be erected to a height of more than one hundred and twenty-five feet and that in the second district no building shall be erected to a height of more than eighty feet, are constitutional.

The provision of St. 1904, c. 333, § 2, by which the Legislature delegated to the commission on the height of buildings in the city of Boston, thereby created, the power to determine for a period of fifteen years the boundaries of the two districts of the city of Boston provided for by that statute, in one of which the height of buildings is restricted by the statute to one hundred and twenty-five feet and in the other to eighty feet, is constitutional, this work of the commissioners being not legislation but the ascertainment of facts and the application of the statute to them for purposes of administration.

The power to make rules and regulations in the nature of subsidiary legislation may be delegated by the Legislature to a local board or commission, such rules being subject to be tested in the courts to determine whether they reasonably are directed to the accomplishment of the lawful purpose of the statute under which they were made.

The provisions of St. 1905, c. 383, delegating to the commission, whose appointment thereby was directed, the power to fix different heights between eighty and one hundred feet and between eighty and one hundred and twenty-five feet at which buildings might be erected in different places in the district in the city of Boston established under St. 1904, c. 333, within which buildings were limited to the height of eighty feet, and to name the conditions under which buildings might be erected at the heights fixed by them in the places designated by them, are constitutional, and all reasonable regulations made by the commission directed to the proper accomplishment of the purpose of the statute will be enforced.

A provision in an order of the commission appointed under St. 1905, c. 383, regulating the height of buildings in the portion of the city of Boston designated as residential under authority of St. 1904, c. 333, that buildings may be erected on streets exceeding sixty-four feet in width to a height equal to one and one quarter times the width of the street upon which the building stands, and not exceeding one hundred feet in any event, is not outside the constitutional power of the commission.

This court cannot say that a provision in an order of the commission appointed under St. 1905, c. 383, regulating the height of buildings in the portion of the city of Boston designated as residential under authority of St. 1904, c. 333, that "no building shall be erected to a height greater than eighty feet unless its width on each and every public street on which it stands will be at least one-half its height," was made entirely for aesthetic reasons; and therefore such a provision is not unconstitutional.

On a petition for a writ of mandamus addressed to the members of the board of appeal from the building commissioner of the city of Boston ordering the respondents to direct the building commissioner to grant to the petitioner a permit to



erect a certain building to a height of one hundred and twenty feet, if the permit was refused on the ground that the height of the proposed structure would exceed the limit fixed by St. 1904, c. 333, and St. 1905, c. 383, and the orders of the commissioners thereunder, and the petitioner admits that if those statutes and the orders thereunder are constitutional his application for a building permit was refused rightly, the court has jurisdiction to dispose of the case on its merits, and the proceeding is a proper one to test the constitutionality of the statutes and the orders.

The building commissioner of the city of Boston, and the members of the board of appeal from his decisions, are not judicial officers.

The fact that the refusal of an officer to act is founded on a mistake of law does not preclude a writ of mandamus as a remedy to compel him to act.

PETITION, filed December 21, 1905, and amended February 19, 1906, for a writ of mandamus addressed to the members of the board of appeal from the building commissioner of the city of Boston ordering the respondents to direct the building commissioner to grant to the petitioner a permit to erect on the lot of land numbered eight on Arlington Street in Boston on the corner of Marlborough Street in that city, owned by the petitioner as trustee, a certain building, described and designated in an application and plans filed with the building commissioner, of the height of one hundred and twenty feet and six inches measured from the sidewalk to the highest point of the roof. The permit was refused by the building commissioner on September 26, 1905, on the ground that the proposed structure would exceed in height the limit permitted by St. 1904, c. 333, and St. 1905, c. 383, and the orders of the commissioners thereunder. On the same day the petitioner appealed to the respondents from this refusal on the ground that the statutes named and the orders of the commissioners thereunder are unconstitutional and void.

On September 29, 1905, the respondents made the following decision: "Upon hearing before this Board on September 29, the appellant, through his attorney, Mr. Owen D. Young, admits and concedes that on the facts incidental to his application to erect the building in question a permit was rightly refused by the commissioner if Stat. 1904, Chap. 333, and Stat. 1905, Chap. 383, and the respective reports of the commissions thereunder be constitutional, and on this admission and concession the Board directs the commissioner to withhold a permit."

The case came on to be heard before *Braley, J.*, who found the facts to be as alleged in the petition and admitted in the answer,

and reserved the case upon the findings and the pleadings for determination by the full court. If the statutes therein referred to are constitutional and valid, the petition was to be dismissed; otherwise, such order was to be entered thereon as law and justice might require.

St. 1904, c. 383, entitled "An Act relative to the height of buildings in the city of Boston," is as follows:

"Section 1. The city of Boston shall be divided into districts of two classes, to be designated districts A and B. The boundaries of the said districts, established as hereinafter provided, shall continue for a period of fifteen years, and shall be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial shall be in the district or districts designated B.

"Section 2. Upon the passage of this act the mayor of the city shall appoint a commission of three members to be called 'Commission on Height of Buildings in the City of Boston.' The commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of the districts aforesaid, and, within one month after its appointment, shall cause the same to be recorded in the registry of deeds for the county of Suffolk. The boundaries so established shall continue for a period of fifteen years from the date of the said recording. Any person who is aggrieved by the said order may, within thirty days after the recording thereof, appeal to the commission for a revision; and the commission may, within six months after its appointment, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk, and shall date back to the original date of recording. The members of the commission shall serve until the districts have been established as aforesaid; and any vacancy in the commission caused by resignation, death or inability to act shall be filled by the mayor, on written application by the remaining members of the commission or of ten inhabitants of the city.

The members of the commission shall receive such compensation as the mayor shall determine.

“Section 3. In the city of Boston no building shall be erected to a height of more than one hundred and twenty-five feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than eighty feet above the grade of the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, nor to steeples, domes, towers or cupolas erected for strictly ornamental purposes, of fireproof material, on buildings of the above height or less in any district. The supreme judicial court and the superior court shall each have jurisdiction in equity to enforce the provisions of this act, and to restrain the violation thereof.

“Section 4. This act shall take effect upon its passage.”

St. 1905, c. 883, entitled “An Act relative to the height of buildings in the city of Boston,” is as follows:

“Section 1. Within thirty days after the passage of this act the mayor of the city of Boston shall appoint a commission of three members to determine, in accordance with the conditions hereinafter provided, the height of buildings within the district designated by the commission on height of buildings in the city of Boston as district B, in accordance with chapter three hundred and thirty-three of the acts of the year nineteen hundred and four.

“Section 2. Said commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of or otherwise pointing out such parts, if any, of said district B as it may designate in which buildings may be erected to a height exceeding eighty feet but not exceeding one hundred feet, and the height between eighty feet and one hundred feet to which buildings may so be erected, and the conditions under which buildings may be erected to said height, except that such order may provide for the erection of buildings as aforesaid to a height not exceeding one hundred and twenty-five feet in that portion of said district B which lies within fifty feet from the boundary line separating said district B from the district designated by the commission on height of buildings in the city of Boston as district A in accordance

with said chapter three hundred and thirty-three, provided said boundary line divides the premises affected by such order from other adjoining premises both owned by the same person or persons, and within sixty days after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. Any person who is aggrieved by such order may, within sixty days after the recording thereof, appeal to the commission for a revision; and the commission may, previous to the first day of January in the year nineteen hundred and six, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk and shall date back to the original date of recording. The boundaries so established shall continue for a period of fifteen years from the date of the recording of the order made by the commission on height of buildings in the city of Boston under chapter three hundred and thirty-three of the acts of the year nineteen hundred and four. The members of the commission shall receive such compensation as the mayor shall determine.

"Section 3. Within such parts of district B as may be designated by the commission as aforesaid (which may, except as hereinafter provided, include any parts of said district B affected by prior acts limiting the height of buildings) buildings may be erected to the height fixed by the commission as aforesaid, exceeding eighty feet but not exceeding one hundred feet, or one hundred and twenty-five feet as hereinbefore provided, and subject to such conditions as may be fixed as aforesaid by the commission; but within the following described territory, to wit:—Beginning at the corner of Beacon street and Hancock avenue, thence continuing westerly on Beacon street to Joy street, thence continuing northerly on Joy street to Myrtle street, thence continuing easterly on Myrtle street to Hancock street, thence continuing southerly on Hancock street and Hancock avenue to the point of beginning, no building shall be erected to a height greater than seventy feet, measured on its principal front, and no building shall be erected on a parkway, boulevard or public way on which a building line has been established by the board of park commissioners or by the board of street commissioners, acting under any general or special statute, to a greater height than that allowed by the order of said boards;

and no building upon land any owner of which has received and retained compensation in damages for any limitation of height or who retains any claim for such damages shall be erected to a height greater than that fixed by the limitation for which such damages were received or claimed.

“Section 4. No limitations of the height of buildings in the city of Boston shall apply to churches, steeples, towers, domes, cupolas, belfries or statuary not used for purposes of habitation, nor to chimneys, gas holders, coal or grain elevators, open balustrades, skylights, ventilators, flagstuffs, railings, weather vanes, soil pipes, steam exhausts, signs, roof houses not exceeding twelve feet square and twelve feet high, nor to other similar constructions such as are usually erected above the roof line of buildings.

“Section 5. This act shall take effect upon its passage.”

On July 5, 1904, Nathan Matthews, Jr., Joseph A. Conry and Henry Parkman, the commissioners appointed by the mayor of Boston under St. 1904, c. 333, made an order, which was recorded in the registry of deeds for the county of Suffolk on the same day, establishing the boundaries of districts A and B under that statute. This was revised by an order made by the same commissioners on December 3 and recorded on December 5, 1904.

On July 21, 1905, the same persons, having been appointed by the mayor of Boston commissioners under St. 1905, c. 383, made the following order, which was recorded on the same day:

“The undersigned having been appointed on May 25, 1905, by the Mayor of the City of Boston, under the provisions of chapter 383 of the Acts of 1905, members of a commission to determine, in accordance with the provisions of said acts, the height of buildings within the district designated by the Commission on Height of Buildings in the City of Boston, as District B, in accordance with chapter 333 of the Acts of 1904, and having given notice and public hearings, hereby determine and order that in any of the Districts B, as designated by said Commission on Height of Buildings, in its order of July 5, 1904, as amended by its order of December 3, 1904, the said orders being recorded with Suffolk Deeds, book 2976, page 45, and book 3008,

page 129, respectively, buildings may be erected on streets exceeding sixty-four (64) feet in width, to a height equal to one and one quarter times the width of the street upon which the building stands; and, if situated on more than one street, the widest street is to be taken, the height to be measured from the mean grade of the curbs of all the streets upon which the building is situated, and not exceeding one hundred (100) feet, in any event.

"If the street is of uneven width, its width will be considered as the average width opposite the building to be erected.

"The width of a street shall be held to include the width of any space on the same side of the street upon which a building stands, upon or within which space no building can be lawfully erected by virtue of any building line established by the Board of Street Commissioners or the Board of Park Commissioners acting under general or special laws.

"All streets or portions of streets upon which buildings may be erected on one side only shall be considered as of a width of eighty (80) feet as to that portion upon which buildings may be erected on one side only.

"In the case of irregular or triangular open spaces formed by the intersection of streets, the width of the street shall be taken as the width of the widest street entering said space at the point of entrance.

"No building shall, however, be erected on a parkway, boulevard or public way on which a building line has been established by either of said boards acting under general or special laws to a height greater than that allowed by said general or special laws, nor otherwise in violation of section 3 of said chapter 383, Acts of 1905.

"No building shall be erected to a height greater than eighty (80) feet unless its width on each and every public street upon which it stands will be at least one-half its height.

"Nothing in this order shall be construed as affecting any condition or restriction imposed by deed, agreement or by operation of law on any property in said District B.

"The said Commissioners further provide that buildings may be erected to a height not exceeding one hundred and twenty-five (125) feet in that portion of the District B as established

by the Commission on Height of Buildings in its order dated December 3, 1904, recorded with Suffolk Deeds, book 3008, page 129, which lies fifty (50) feet westerly from the boundary line running from Columbus avenue to the centre of Boylston street, separating said District B from District A, as established by said order; *provided, however*, that said portion of District B is owned by the same person or persons who own the adjoining premises in District A.

"In witness whereof, the undersigned, being a majority of said commission, the third member (Nathan Matthews) being in Europe, hereto set their hands, this 21st day of July, 1905.

Joseph A. Conry,  
Henry Parkman,

"Commission on Height of Buildings in the City of Boston."

*B. E. Eames*, for the petitioner:

*T. M. Babson*, for the respondents.

KNOWLTON, C. J. The principal question presented by this case is whether the St. 1904, c. 333, and the St. 1905, c. 383, and the orders of the commissioners appointed under them, relative to the height of buildings in Boston, are constitutional. A jurisdictional question, if the petitioner is entitled to relief, is whether a remedy can be given him by a writ of mandamus.

The principal question may be subdivided as follows: First, can the Legislature, in the exercise of the police power, limit the height of buildings in cities so that none can be erected above a prescribed number of feet; second, can it classify parts of a city so that in some parts one height is prescribed and in others a different height; third, if so, can it delegate to a commission the determination of the boundaries of these different parts, so as to conform to the general provisions of the statute; fourth, can it delegate to a commission the making of rules and regulations such as to permit different heights in different places, according to the different conditions in different parts of one of the general classes of territory, made in the original statute; fifth, if it can, are the rules and regulations made by the commissioners within the statute, and within the constitutional authority of the Legislature and its agents?

In the exercise of the police power the Legislature may regulate and limit personal rights and rights of property in the

interest of the public health, public morals and public safety. *Commonwealth v. Pear*, 183 Mass. 242. *Commonwealth v. Strauss*, 191 Mass. 545. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power. *Commonwealth v. Strauss*, *ubi supra*.

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air, and thus to affect the public health. It may also increase the danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good. In *Attorney General v. Williams*, 174 Mass. 476, this court said: "Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments in the exercise of the police power, for the safety, comfort, and convenience of the people and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. *Watertown v. Mayo*, 109 Mass. 315. *Salem v. Maynes*, 123 Mass. 372. *Sawyer v. Davis*, 136 Mass. 239." In *People v. D'Oench*, 111 N. Y. 359, a statute limiting the height of dwelling houses to be erected in the city of New York was treated as unquestionably constitutional. See 1 Abbott, Mun. Corp. § 125; 2 Tiedeman, State and Federal Control, § 150. There is nothing in *Parker v. Commonwealth*, 178 Mass. 199, against the validity of the statutes now before us. That case was decided upon the construction given by the court to the legislative act under which it arose. The court held that the Legislature had not assumed to determine that any limitation of the height of buildings on the designated streets was required, in the interest of the public health and public safety, or of the public welfare, and it left open the question whether the Legislature might have made the restriction, without providing compensation, if it had declared in the statute that no damages should be paid. It is for the Legislature to determine whether the public health or public safety requires such a limitation of the rights of landowners in



a given case. Upon a determination in the affirmative, they may legislate accordingly.

The next question is whether the General Court may establish different heights for different neighborhoods, according to their conditions and the uses to which the property in them is put. The statute should be adapted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable, not only in reference to the interests of the public, but also in reference to the rights of landowners. If these rights and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each should be made to yield reasonably to those upon the other side. The value of land and the demand for space, in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce, is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was, therefore, reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.

The general subject is one that calls for a careful consideration of conditions existing in different places. In many cities there would be no danger of the erection of high buildings in such locations and of such a number as to affect materially the public health or safety, and no statutory restrictions are necessary. Such restrictions in this country are of very recent origin, and they are still uncommon. Unless they place the limited height at an extreme point, beyond which hardly any one would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed, and the manner in which the land is laid out, and the nature of the approaches to it.

It was decided in *Commonwealth v. Boston Advertising Co.* 188 Mass. 348, that a statute of this kind cannot constitutionally be passed for a mere aesthetic object. It was said in *Attorney General v. Williams*, 174 Mass. 476, 480, that the statute then before the court, enacted under the right of eminent domain,

with compensation for landowners, would have been unconstitutional if it had been passed "to preserve the architectural symmetry of Copley Square," or "merely for the benefit of individual property owners." The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely aesthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary. We are of opinion that the provision of the St. 1904, c. 333, for dividing parts of the city into two classes, in each of which there is a prescribed limit for the height of buildings, was within the power of the Legislature, and in accordance with the constitutional principle applicable to the enactment.

The delegation to a commission of the determination of the boundaries of these parts for the two classes was within the constitutional power of the General Court. The work of the commissioners under the first act was not legislation, but the ascertainment of facts, and the application of the statute to them for purposes of administration. Such subsidiary work by a commission is justified in many cases. *Commonwealth v. Plaisted*, 148 Mass. 375. *Brodvine v. Revere*, 182 Mass. 598. *Commonwealth v. Sisson*, 189 Mass. 247. *Stark v. Boston*, 180 Mass. 293. *Kingman, petitioner*, 153 Mass. 566. *Taunton v. Taylor*, 116 Mass. 254. *Nelson v. State Board of Health*, 186 Mass. 380. *Commonwealth v. Bennett*, 108 Mass. 27. *Field v. Clark*, 143 U. S. 649, 692. *In re Kollock, petitioner*, 165 U. S. 526.

The delegation to a commission of the power to fix different heights in different places in the parts included in Class B, under the St. 1905, c. 383, goes further, and allows the commissioners to make rules and regulations which are in the nature of subsidiary legislation. This is within the principle referred to in *Brodvine v. Revere*, *ubi supra*, and in some of the other cases above cited. It is that, under our system in Massachusetts, matters of local self-government might always be entrusted to the inhabitants of towns. On the establishment of cities this power is exercised by the city council, or by some board or commission representing the inhabitants. Even in towns such powers have long been exercised by local boards, for example,

by the board of health. Originally such representatives of the local authority were elected by the people; but for many years local boards, appointed by the Governor or other executive authority, have sometimes been entrusted with the exercise of this legislative authority. It is true that they are further from the people than the members of a city council, for whom the people vote, but in a true sense they represent the inhabitants in matters of this kind. Our decisions cover this point also. *Commonwealth v. Plaisted, Brodbine v. Revere, ubi supra.*

It does not follow that all rules and regulations made under such a delegation of authority would be constitutional, merely because the original statute is unobjectionable. Such rules may be tested by the courts to see whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests, and whether they have a real, substantial relation to the public objects which the government can accomplish. A statute, ordinance or regulation will not be held void merely because the judges differ from the legislators as to the expediency of its provisions. But if it is arbitrary and unreasonable, so as unnecessarily to be subversive of rights of property, it will be set aside by the courts. *In re Jacobs*, 98 N. Y. 98, 110. *People v. Gillson*, 109 N. Y. 389, 403. *New York Health Department v. Trinity Church*, 145 N. Y. 32, 40. *Chicago, Burlington & Quincy Railway v. Drainage Commissioners*, 200 U. S. 561, 593. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318. *Lawton v. Steele*, 152 U. S. 133, 137. *Dobbins v. Los Angeles*, 195 U. S. 223, 235, 238. *Jacobson v. Massachusetts*, 197 U. S. 11, 28, 31.

We do not see that the action of the commissioners, under the St. 1905, was beyond their power under the constitution. It was seemingly in accordance with the general purpose of the Legislature, and was directed to considerations which they deemed proper in adjusting the rights and interests of property owners and the public. The question is not whether the court deems all the provisions wise; but whether they appear to be outside of the constitutional power of the commission. In prescribing heights in the district, the commissioners might make the width of the streets on which a building was to be erected one factor to be considered. Their action in this particular

relates wholly to buildings in Class B, which includes only the residential parts of the city.

We cannot say that the prohibition of the erection of a building of a greater height than eighty feet in Class B, unless its width "on each and every public street upon which it stands will be at least one-half its height," was entirely for aesthetic reasons. We conceive that the safety of adjoining buildings, in view of the risk of the falling of walls after a fire, may have entered into the purpose of the commissioners. We are of opinion that the statutes and the orders of the commissioners are constitutional.

We think that the court has jurisdiction to dispose of the case on the merits, under this petition for a writ of mandamus. The wrong alleged is that the building commissioner, and afterwards the board of appeal, refused to give the petitioner a permit to erect a building. It is conceded that the petitioner was not entitled to a permit if the statutes and orders referred to are constitutional. He alleges that the board of appeal refused to do their duty, and that his only effectual remedy is by a writ of mandamus, ordering them to grant a permit. The case comes within the general rule giving jurisdiction to issue such writs. *Farmington River Water Power v. County Commissioners*, 112 Mass. 206, 212. *Carpenter v. County Commissioners*, 21 Pick. 258, 259. *Attorney General v. Boston*, 123 Mass. 460. See *Locke v. Selectmen of Lexington*, 122 Mass. 290; *Attorney General v. Northampton*, 143 Mass. 589.

The building commissioner and the board of appeal are not judicial officers. St. 1892, c. 419. St. 1894, c. 443. The fact that a refusal to act is founded on a mistake of law does not preclude a remedy by a writ of mandamus. In cases where the duty to perform an act depends solely on the question whether a statute or ordinance is constitutional and valid, the question may sometimes be determined on a petition for a writ of mandamus. *Attorney General v. Boston*, 123 Mass. 460. *Warren v. Charlestown*, 2 Gray, 84. *Larcom v. Olin*, 160 Mass. 102, 110.

*Petition dismissed.*

HARRY H. BRADLEE vs. SOUTHERN COAST LUMBER  
COMPANY.

Suffolk. November 13, 1906. — January 1, 1907.

Present : KNOWLTON, C. J., HAMMOND, BRALEY, LORING, & SHELDON, JJ.

*Agency, Termination. Contract, What constitutes. Pleading, Civil, Declaration.*

By an instrument in writing, executed under seal by a lumber company and one B. named therein, the company appointed B. its "sales agent, for the sale of all the lumber that will or may be sawed from the timber now owned by the company on" a certain tract named, "the said B. agreeing on his part to sell all our lumber by the time it is in shipping condition at the market price." The instrument further provided that "the said B. shall receive a commission of five per cent for selling on the f. o. b. shipping point prices on all lumber sold by him and shipped by the company in compliance with the terms of this agreement, which appointment is made in accordance with the authority given the board of directors in article second of section third. . . . We, the company, to pay all necessary travelling expenses of the said B." The article of the by-laws referred to provided that "The board of directors shall have the power . . . to appoint and remove at pleasure all employees and agents of the corporation." The agent sued the company upon this instrument as a contract, alleging as a breach that the defendant "notified the plaintiff that it would not require his services as selling agent for said lumber" and refused "to allow him to carry out his part of said contract." On demurrer, it was *held*, that the declaration set forth no cause of action, the appointment of the plaintiff being revocable at the pleasure of the directors of the defendant, and the agreement contained in the instrument relating only to the nature of the plaintiff's agency and the compensation to be paid him while the agency was in force.

In an action of contract against a lumber company on an agreement in writing under which the plaintiff was appointed the selling agent of the defendant for a certain territory and afterwards was notified by the defendant that his services as selling agent no longer would be required, the declaration alleged "that before said denial of the existence of said contract and said notification by the defendant to the plaintiff that it would not require his services as said selling agent the plaintiff relying upon said contract consumed much time and went to great expense in arranging and negotiating with purchasers for the sale to them of said lumber when the same would be in shipping condition, and had rendered a great amount of service to the defendant for the purpose of carrying out said contract and had expended large sums of money in placing the defendant in a position to operate and saw said timber into lumber in order that the same would be in shipping condition." On demurrer, it was *held*, that the foregoing portion of the declaration contained no allegation that the plaintiff set on foot any negotiations which resulted in sales or that he incurred any expenses in negotiations so resulting.

CONTRACT for the alleged breach of a contract in writing.  
Writ dated October 4, 1905.

The declaration as amended was as follows:

"And the plaintiff says that on the sixteenth day of February A. D. 1903, the defendant made a written contract with the plaintiff, a copy of which is hereto annexed and marked 'A,' (together with a copy of article second of section third of the defendant's by-laws, which is marked 'B,') by which the defendant agreed to employ and did employ the plaintiff as the selling agent of the defendant to sell all the lumber that was to be cut and sawed from the timber on a certain tract of land owned by the defendant and known as the Tuckahoe plantation, situated in Screven County in the State of Georgia for which the defendant agreed to pay the plaintiff a commission of 5% on the f. o. b. shipping point prices on all the lumber thus sold by him and shipped by the defendant and in addition the defendant agreed to pay all necessary travelling expenses of the plaintiff; and the plaintiff agreed to and did become the said selling agent for the defendant under the terms of said contract. That the defendant has already cut and sawed a large amount of lumber from timber on said tract which lumber is in shipping condition and is now cutting and sawing lumber from said timber, and intends to continue cutting and sawing said timber until all of the timber on said plantation has been cut and sawed into lumber.

"And the plaintiff has always been and is ready and willing and able to sell all of said lumber thus cut and sawed and to be cut and sawed from said timber on said Tuckahoe plantation in accordance with the terms of said contract and has repeatedly notified the defendant of his readiness and ability to carry out all the terms of said contract incumbent upon him to perform, but the defendant refuses to allow him to carry out his part of said contract and denies the existence of said contract and has notified the plaintiff that it would not require his services as selling agent for said lumber. That before said denial of the existence of said contract and said notification by the defendant to the plaintiff that it would not require his services as said selling agent the plaintiff relying upon said contract consumed much time and went to great expense in arranging and negotiating with purchasers for the sale to them of said lumber when the same would be in shipping condition, and had rendered a

great amount of service to the defendant for the purpose of carrying out said contract and had expended large sums of money in placing the defendant in a position to operate and saw said timber into lumber in order that the same would be in shipping condition.

"And the plaintiff says that the amount of timber upon said Tuckahoe plantation which was included under the terms of said contract would produce about thirty million feet of lumber and that the plaintiff was, is and always has been ready and willing and able to sell the same at market prices in accordance with said contract, and that by the refusal of the defendant to perform the part of said contract incumbent upon it to perform the plaintiff has suffered great damage, to wit; in the sum of twenty-five thousand (25,000) dollars."

The instrument marked "A" annexed to the declaration was as follows:

"In consideration of one dollar (\$1.00) and other valuable considerations, the receipt whereof is hereby acknowledged, we, the Southern Coast Lumber Company, a company duly incorporated under the laws of the State of Maine, with principal office in Boston, Mass., hereby make the following contract with Harry H. Bradlee of Boston, Mass. :—

"Whereas: we, the Southern Coast Lumber Company, make and appoint the said Bradlee our sales agent, for the sale of all the lumber that will or may be sawed from the timber now owned by the company on the tract known as the Tuckahoe plantation, subject, however, to the following conditions: the said Bradlee agreeing on his part to sell all our lumber by the time it is in shipping condition at the market price, and if the said Bradlee fails to do so, then we, the Southern Coast Lumber Company, shall have the right to sell our lumber at such times, and the said Bradlee shall not receive any commission or payment on any and all sales so made by company.

"The said Bradlee shall receive a commission of five per cent. (5%) for selling on the f. o. b. shipping point prices on all lumber sold by him and shipped by the company in compliance with the terms of this agreement, which appointment is made in accordance with the authority given the board of directors in article second of section third, relating to powers of directors.

"We, the company, to pay all necessary travelling expenses of the said Bradlee.

"Witness our hands and seals this sixteenth day of February, 1903.

"Southern Coast Lumber Company.

By Alfred Shales, Treas. (Seal)

Harry H. Bradlee." (Seal)

The article of the by-laws marked "B" was as follows:

"Section 3. The Board of Directors shall have the power:

"Second. To appoint and remove at pleasure all employees and agents of the corporation, prescribe their duties, and require of them security for the faithful discharge of the same."

The defendant demurred to the declaration, and for cause of demurrer specified that the declaration did not set forth any contract to retain the plaintiff in the defendant's employ or any breach of any contract but only an authority to the plaintiff to act as the defendant's agent revocable and revoked by the defendant.

In the Superior Court the case came on to be heard before *Fessenden, J.* upon the demurrer to the amended declaration as above set forth. The judge overruled the demurrer, and, being of the opinion that the questions raised by the demurrer ought to be determined by this court before any further proceedings in the trial court, reported the case to this court for such determination.

*W. W. Towle (F. K. Linscott with him,)* for the plaintiff.

*E. R. Thayer (T. K. Lothrop, Jr., with him,)* for the defendant.

LORING, J. We are of opinion that this demurrer must be sustained.

The plaintiff's first contention is that in and by the writing declared on the defendant impliedly agreed that the plaintiff should have the right to sell all the lumber sawed by it on the tract of land owned by it, called the Tuckahoe plantation, mentioned in that writing.

In giving a construction to the writing here in question, the form into which it was put by the parties is of great if not vital importance.



It is in form an appointment or the recital of an appointment of the plaintiff as the defendant's agent for the sale of the defendant's lumber, followed by an agreement as to the compensation to be made for such sales (and ending with a reference to one of the by-laws of the defendant corporation) by which the plaintiff's appointment is in terms made revocable at the pleasure of the defendant's directors.

The statement in such an instrument that the plaintiff is the defendant's agent "for the sale of all the lumber that will or may be sawed" on the tract of land in question cannot be construed to be an implied agreement on the part of the defendant, which is broken by the defendant if the plaintiff's authority is revoked by the defendant's directors (in pursuance of the by-law referred to), before he has sold all the lumber in question. That statement must be construed to be what it purports to be, namely, a provision as to what the agency is so long as it continues in force. It probably was inserted, as suggested by the defendant's counsel, to make it plain that the plaintiff's agency extended to all kinds of lumber sawed from the plantation in question.

In our opinion, by the true construction of this contract the appointment of the plaintiff was revocable at the pleasure of the directors of the defendant corporation, and the agreement made was an agreement as to the nature of his agency and as to the compensation to be paid to him while the agency was in force.

The conclusion to which we have come is supported by *Douglas v. Merchants Ins. Co.* 118 N. Y. 484, cited by the plaintiff. We have examined all the other cases cited by him and find nothing in them to the contrary. Our conclusion is also supported by the construction given to the written agreements in question in the following cases: *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Penn. St. 426; *Orr v. Ward*, 73 Ill. 318; *Jacobs v. Warfield*, 23 La. Ann. 895; *Williamson v. Taylor*, 5 Q. B. 175; *Aspdin v. Austin*, 5 Q. B. 671; *Dunn v. Sayles*, Dav. & Mer. 579; *Burton v. Great Northern Railway*, 9 Exch. 507. See also in this connection *Busell Trimmer Co. v. Coburn*, 188 Mass. 254; *Lees v. Whitcomb*, 5 Bing. 34; *Sykes v. Dixon*, 9 Ad. & El. 693; *Chicago & Great Eastern Railway v. Dane*, 43 N. Y. 240; *Martin v. New York Ins. Co.* 148 N. Y. 117.

The plaintiff's second contention is that if that be the true construction of the writing declared on he is entitled to recover (1) for what he did before his appointment was revoked in setting on foot negotiations which resulted in sales, and (2) for expenses incurred by him in his agency.

The difficulty with this contention is that he has not alleged that he did set on foot any such negotiations or that he incurred any such expense. The breach alleged is "That before said denial of the existence of said contract and said notification by the defendant to the plaintiff that it would not require his services as said selling agent the plaintiff relying upon said contract consumed much time and went to great expense in arranging and negotiating with purchasers for the sale to them of said lumber when the same would be in shipping condition, and had rendered a great amount of service to the defendant for the purpose of carrying out said contract and had expended large sums of money in placing the defendant in a position to operate and saw said timber into lumber in order that the same would be in shipping condition."

The entry must be

*Order overruling demurrer reversed; demurrer sustained.*

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### COMMONWEALTH vs. CHARLIE JOE.

Plymouth. November 19, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

#### *Gaming.*

On the trial of a complaint under R. L. c. 214, § 5, for keeping a common gaming house it is not necessary for the Commonwealth to show that the whole of the premises controlled by the defendant were used for the purpose of unlawful gaming. It is sufficient to justify a conviction if any one of the rooms of such premises was used for this purpose.

To justify a conviction on a complaint under R. L. c. 214, § 5, for keeping a common gaming house, it is not necessary for the Commonwealth to show that gaming was the only or the principal purpose for which the premises were kept by the defendant. It is sufficient if it was one of the purposes.

To justify a conviction on a complaint under R. L. c. 214, § 5, for keeping a com-

mon gaming house, it is not necessary for the Commonwealth to show that the place was open to the public. It is sufficient to show that any number of persons were in the habit of resorting there for illegal gaming.

To justify a conviction on a complaint under R. L. c. 214, § 5, for keeping a common gaming house, it is not necessary for the Commonwealth to show that the defendant kept the place for any special gain to himself. It is enough if he took his chance at the game with the others, the other elements of the offence being made out.

COMPLAINT, received and sworn to in the Police Court of the City of Brockton on January 30, 1905, against Charlie Joe, otherwise known as Joe Chung, otherwise known as Joe Hay, of Brockton, under R. L. c. 214, § 5, charging him with keeping a common gaming house during the three months next before the thirtieth day of January, 1905.

At the trial in the Superior Court before *Crosby, J.* there was evidence that the defendant was a Chinese person who kept a laundry at No. 65 Pleasant Street in Brockton, and that on the three Sundays January 8, 15 and 29, games with cards and money were carried on in a room back of the laundry shop; that on the Sunday last named the police officers raided the premises and found the defendant and six other Chinese persons in the back room of the laundry, and found money and cards on the table; that these persons attempted to hide both cards and money when the officers came in upon them and attempted to escape, one of them hiding in a closet.

There was other evidence of money and cards being found on the defendant and the other Chinese persons present, and that the defendant was the proprietor of the laundry at 65 Pleasant Street and was the only person engaged in running it.

The defendant made eleven requests for instructions, of which the judge gave a part of the first, the whole of the seventh, ninth and tenth, and a part of the fourth, refusing to give the others.

The instructions and parts of instructions which the judge refused to give are as follows, the portions of the first and fourth instructions given by him being enclosed in brackets:

1. In order to convict the defendant the jury must be satisfied, —

[(a) The defendant kept a place or tenement;

(b) That one of the purposes for which the place was kept was unlawful gaming;]

(c) That persons visited the place kept by the defendant habitually for the purpose of unlawful gaming.

2. If the jury find that the place kept by the defendant was a laundry, and that in this laundry the defendant was occasionally visited by other Chinese persons, who, while there, played at unlawful games, this does not constitute the offence described in R. L. c. 214, §§ 5, 23, and he cannot be convicted.

3. Proof of a single unlawful game, engaged in by others in the defendant's laundry, or of sporadic instances of such games therein, is not enough to justify a conviction of the defendant. The jury must be satisfied upon all the evidence, beyond a reasonable doubt, that the defendant kept the place for the purpose of permitting other persons to regularly and constantly visit it and engage in unlawful games.

4. [The burden is upon the government to prove that the defendant personally had control over the place named in the complaint for some substantial period of time,] and that during this period persons habitually and continually attended at it and engaged in unlawful gaming, with the consent, concurrence, and approbation of the defendant.

5. The defendant can be convicted only by the finding of the jury, upon all the evidence, that one of the purposes for which the place described in the complaint was kept by the defendant was the business of permitting illegal gaming to be carried on there. The jury must find, in order to convict him, that the defendant permitted illegal gaming on his premises in return for a pecuniary gain or advantage to himself; mere permissive use of his house for games which might be illegal is not enough to justify his conviction.

6. Illegal gaming is an agreement between two or more persons to use their money or property in a contest of chance, where one may be the gainer and the other the loser. The government must prove that money or other valuable thing actually changed ownership, or the defendant cannot be convicted.

8. The government must prove, beyond a reasonable doubt, that the place kept by him as charged was habitually frequented by others for the purpose of illegal gaming, and it is not enough to prove that it was used by the defendant himself for illegal gaming.

11. Upon all the evidence in the case the defendant must be acquitted.

The judge instructed the jury that it was not necessary for the government to show that the whole of the premises were used for the purpose of unlawful gaming, but it was sufficient to justify a conviction if they found that the defendant kept any one of the rooms of the premises at 65 Pleasant Street for this purpose; that it was not necessary for the government to show that this was the only or principal purpose for which the place was kept; it was enough if it was one of the purposes; nor was it necessary that the place should be open to the public; admission might be limited to the members of a club or to a few people; and if any number of persons were in the habit of resorting to this place for illegal gaming it would justify his conviction. If the place was resorted to for this purpose on one occasion only the defendant would not be liable, but if it was commonly resorted to he would be.

The judge also, among other things, instructed the jury that the Commonwealth was not obliged to show that the defendant kept the place for any special gain to himself. If he took his chance at the game with the others he would be guilty, all the other elements in the case being made out.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*H. H. Pratt*, for the defendant.

*T. E. Grover*, District Attorney, for the Commonwealth.

SHELDON, J. The only questions now pressed in this case arise upon the defendant's exceptions to the refusal of the court at his trial to give certain instructions asked for by him. He has not however argued his eleventh request, that upon all the evidence he must be acquitted. Plainly this instruction could not have been given. *Commonwealth v. Warren*, 161 Mass. 281.

The exceptions do not purport to set out all the instructions that were given; those that are stated were full, accurate and well adapted to secure the defendant's rights. They required the Commonwealth to show that the place was kept and controlled by the defendant; that at least some part of it was kept by him and was actually used for some substantial period of time for the purpose of unlawful gaming, and was commonly

resorted to for this purpose; and all the essential elements of the offence charged in the complaint were stated. In our opinion, all of the requests to which he was entitled were given in substance. *Commonwealth v. Kerrissey*, 141 Mass. 110. *Commonwealth v. Coleman*, 184 Mass. 198. *Commonwealth v. Smith*, 166 Mass. 370. *Commonwealth v. Blankinship*, 165 Mass. 40. There is nothing in *Commonwealth v. Stahl*, 7 Allen, 804, or *Commonwealth v. Leavitt*, 12 Allen, 179, to help the defendant.  
*Exceptions overruled.*

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### BOSTON MOLASSES COMPANY vs. COMMONWEALTH.

Suffolk. November 21, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Commonwealth. Commonwealth Flats. Landlord and Tenant. Tax.*

St. 1904, c. 385, provides that lands of the Commonwealth "known as the Commonwealth Flats, shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof." A lease for business purposes of land on the Commonwealth Flats, made by the Commonwealth before the enactment of this statute, contained a covenant of the lessor of quiet enjoyment by the lessee, and a covenant of the lessee to pay the rent, "and also all water rates and all taxes which may be assessed upon any buildings, fixtures or other property put upon said premises by the lessee and which are between the parties hereto treated as and agreed to be personal property." Under the statute above named the city of Boston demanded from the lessee the payment of a tax assessed upon the land, and the lessee paid the tax, and sued the Commonwealth for the amount thus paid. *Held*, that, whether or not R. L. c. 12, § 20, is applicable to the Commonwealth, the lessee by a petition under R. L. c. 201 could recover from the Commonwealth the amount of the tax on the land thus paid by him.

PETITION, filed December 28, 1905, under R. L. c. 201, to recover from the Commonwealth the amount of a tax paid by the petitioner to the city of Boston assessed to it under St. 1904, c. 385, upon land and a pile wharf or pier in that part of Boston called South Boston, constituting a part of the Commonwealth Flats and leased by the Commonwealth to the petitioner by a lease dated May 20, 1902, with a supplementary agreement of the petitioner dated February 23, 1904, to pay an additional

amount of rent on an extension of the pier made by the Commonwealth at the request of the petitioner.

The Commonwealth demurred to the petition, and for cause of demurrer alleged that the petition did not state a legal cause of action, in that it did not appear in the petition that the provisions of R. L. c. 12, § 20, referred to therein, applied to taxes paid by a lessee of land of the Commonwealth in that part of Boston called South Boston known as the Commonwealth Flats, in accordance with the requirements of St. 1904, c. 385.

In the Superior Court *Richardson*, J. made an order sustaining the demurrer, but, being of opinion that the order ought to be determined by this court before any further proceedings were had in the Superior Court, reported the case for such determination, upon the following terms agreed to by the parties: If this court should decide that the demurrer was sustained rightly, the petition was to be dismissed; but, if this court should decide that the demurrer ought to have been overruled, judgment was to be entered for the petitioner in the sum of \$1,616.56, with interest from November 14, 1905.

The material portions of the lease are quoted or described in the opinion.

*L. D. Brandeis*, (*W. H. Dunbar* with him,) for the petitioner.

*D. Malone*, Attorney General, for the Commonwealth.

SHELDON, J. It seems clear to us that the taxes to be assessed under St. 1904, c. 385, were to be imposed upon the lands mentioned in that act and not merely upon the leasehold interest of the tenant, to whom they were to be assessed. The act provides expressly for the taxation of "the lands of the Commonwealth" if leased for business purposes; it provides that they shall be taxed "in the same manner as the lands and buildings thereon would be taxed to [the] lessees if they were the owners of the fee," — words which plainly could be satisfied only by a taxation of the fee simple estate to its full value. The fact that the tax is in terms to be assessed to the lessees is not decisive against this view. All taxes on real estate may be assessed to the person who is in actual possession thereof on the first day of May, as well as to the owner at that time. R. L. c. 12, § 15. St. 1902, c. 113. *Lynde v. Brown*, 143 Mass. 337, 340. *Kerslake v. Cummings*, 180 Mass. 65, 67. This statute, like R. L. c. 12, § 15,

merely provides how the tax shall be laid, to whom it shall be assessed, and who is to be held for its payment in the first instance; it does not in any way determine upon whom the final burden is to be cast. Nor does the fact that the tax is not secured, as in most cases, by a lien upon the whole estate taxed, but only upon the leasehold interest in the lands and upon the buildings thereon, require a different conclusion. This is in substance merely a provision that the ordinary lien for taxes shall not be enforced against the Commonwealth, a restraint which it is clearly within the power of the Legislature to impose. This again has no tendency to show that the whole of the estate is not to be taxed, under words of a statute which plainly contemplate such taxation.

This tax having been duly assessed to the petitioner, and having been paid by it, its present rights to recover from the Commonwealth as the general owner of the property the amount of this tax must depend in the first instance upon the terms of its lease from the Commonwealth. And it must be remembered that in giving this lease the Commonwealth was not acting in its political character as sovereign, but merely as the owner of property, about which it was making a contract. As to this contract it put itself into the position of a private citizen, and the lease must be construed as if it were made between two individuals. *Commonwealth v. André*, 3 Pick. 224, 225. Having chosen to descend from the plane of its sovereignty and to make this contract with a private person, it is to be regarded as itself a private person, and is bound as such. *Hall v. Wisconsin*, 105 U. S. 5, 11. As was said in *People v. Stephens*, 71 N. Y. 527, 549, "The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand



upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor." To the same effect are *Danolds v. State*, 89 N. Y. 36, 44; *Carr v. State*, 127 Ind. 204; *Patton v. Gilmer*, 42 Ala. 548; *Calloway v. Cossart*, 45 Ark. 81, and *Chapman v. State*, 104 Cal. 690.

The lease given by the Commonwealth to the petitioner was dated on the twentieth day of May, 1902, and was delivered on or about that date. It demised to the petitioner the land therein described, for the term of fifteen years from the first day of July, 1903, at an annual rental of \$9,500. After divers other covenants on the part of the Commonwealth, the lessor, which are not now material, it contained the following stipulation: "And the said lessor covenants and agrees with the said lessee and its representatives, that those paying the rent aforesaid, and performing the covenants herein contained on their part to be paid and performed, shall peaceably hold and enjoy the said premises without hindrance or interruption by the said lessor or any person or persons whomsoever." Then followed covenants by the lessee, the petitioner, to pay the rent, "and also all water rates and all taxes which may be assessed upon any buildings, fixtures or other property put upon said premises by the lessee and which are between the parties hereto treated as and agreed to be personal property." Other covenants by the lessee, and the details of a supplemental agreement for the payment of additional rent for an extension to a pier, are not material to the question now to be considered. It is not contended that there has been any breach of agreement by the petitioner.

It appears that the petitioner agreed to pay a fixed rental and certain specified taxes; and the Commonwealth agreed that the petitioner doing this should have peaceable enjoyment of the demised premises. Under this state of facts, the St. of 1904, before referred to, was passed. Under this statute, in conformity with its terms, the tax in question was laid, being for a much larger amount and upon other property than the taxes which the petitioner had agreed to pay, to wit, for the additional amount of over \$1,600, and upon the land and pile wharf; and the question is whether under the terms of this lease the petitioner, having paid, as it was liable to the city of Boston to pay, this additional amount, has a right to require repayment thereof from its lessor.

It is manifest that the lease has fixed, as between these parties, the taxes for which the petitioner is to be held, that is, the taxes "upon any buildings, fixtures or other property put upon said premises by the lessee." This, as to taxes, constitutes by the express terms of the lease, the whole of the burden put upon the lessee; and the covenant of the lessor for quiet enjoyment cannot, as between the parties, be made subject to any more onerous conditions. See the cases cited *supra*. The burden of any further taxes lawfully assessed upon the leased property must, as between these parties, fall finally upon the lessor. The tax is a charge upon the owner by reason of his ownership, and must fall upon him so far as he has not guarded himself therefrom by the terms of his lease. *Walker v. Whittemore*, 112 Mass. 187, 189. The final apportionment of the burden of taxation between landlord and tenant in this Commonwealth has been long regulated by statute, the present provision being found in R. L. c. 12, § 20. But the common law rule is well settled in accordance with the intimation in *Walker v. Whittemore*, *ubi supra*. Taylor, Land. & Ten. § 341, and cases there cited. "The general rule, where the lease is silent upon the subject, imposes upon the lessor the obligation to pay the taxes upon the leased property." Gray, J. in *People v. Barker*, 153 N. Y. 98, 101. *Caldwell v. Moore*, 11 Penn. St. 58. *Leach v. Goode*, 19 Mo. 501. *Weichselbaum v. Curlett*, 20 Kans. 709. *East Tennessee, Virginia & Georgia Railway v. Morristown*, 35 S. W. Rep. 771. The rule is recognized in *Sheldon v. Hamilton*, 22 R. I. 230, 234. See also the cases cited in 18 Am. & Eng. Encyc. of Law, (2d ed.) 639. And the special provision in this lease that the lessee should pay certain specified taxes makes clearer the intention of the parties that he should not be held finally liable for any others. *Harvey v. Murray*, 136 Mass. 377, 378. We cannot doubt accordingly that the final liability for the amount of this tax must, as between the parties, be cast upon the lessor.

Independently therefore of the question whether the provision of R. L. c. 12, § 20, is binding upon the Commonwealth, we are of opinion that the petition states a good cause of action against the Commonwealth. If that statute is binding upon the Commonwealth, the same result follows as a matter of course. Accordingly, and following the terms of the report, the order must

be that the demurrer be overruled and judgment entered for the petitioner in the sum of \$1,616.56, with interest from November 14, 1905; and it is

*So ordered.*

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ABIEL A. VAUGHAN & others, trustees, & others vs. SAMUEL W. BRIDGHAM & another, trustees.

SAMUEL W. BRIDGHAM & another, trustees, vs. ABIEL A. VAUGHAN & others, trustees, & others.

Suffolk. December 3, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Equity Pleading and Practice, Multifariousness. Nuisance. Equity Jurisdiction, To enjoin nuisance.*

The objection that a bill in equity is multifarious is waived by going to a hearing on the merits.

The owner of a building in a city adjoining a passageway ten feet wide, having the right to maintain windows, doors and other openings into and upon the passageway for light and air and to ventilate into it by any proper means, has no right to maintain and operate an electric fan in such a way as to send a current of heated air impure and charged with offensive smells into and across the passageway so as to strike a window of a building on the opposite side of the passageway and to enter it when open; and the owner and the lessee of such opposite building may maintain a suit in equity to enjoin such maintenance and operation of the fan as a nuisance, although the defendant's right of ventilation may include the right to project pure air into the passageway.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 10, 1904, by the owners and lessees of the land and building on the westerly side of Washington Street in Boston, numbered 235 to 239 on that street, the front portion of the building extending over and under a portion of "the passageway leading to Williams Court," against the owners of the land and building on the same side of Washington Street adjoining the southerly side of that passageway, to enjoin the defendants from maintaining, and to have them ordered to remove, a cornice, brackets, bar and sign projecting into the passageway, and to discontinue the use of an electric fan alleged to eject offensive gases, steam and smells into the plaintiffs' property.

ALSO, ANOTHER BILL IN EQUITY by the defendants in the first suit against the plaintiffs in that suit, to enjoin the defendants in such second suit from polluting the air of the same passageway, and to have them ordered to remove certain metal flues, a shaft and a metal grating alleged to project into the passageway unlawfully.

The two cases were heard together by *Morton, J.*, who made a memorandum of findings and rulings, the material portions of which are quoted and described in the opinion.

In the first case the justice made the following decree :

"First. That the fee in the passageway in said bill described is in the plaintiffs, the southerly line of their estate and the northerly line of the estate of the defendants being the southerly line of said passageway and the centre line of the party wall extending along the southerly side of that portion of the passageway over which the building of the plaintiffs is built, subject, however, to a right of way on the surface thereof appurtenant to the estate of the defendants and others, and also to a right on the part of the defendants to maintain doors, windows, and other openings through said party wall for light and air, and entrance and exit, provided the strength of said wall is not diminished thereby, and to ventilate into the said passageway by any proper means, if they do not thereby create a nuisance so as to interfere with the enjoyment by the plaintiffs and their tenants of the premises occupied by and belonging to them.

"Second. That the defendants and those holding under them have no right to extend and maintain bars, brackets, fans, signs, cornices, or any portion of their building northerly of the line thus established, and that such things, having been so placed by the defendants, or those holding or acting under them, be at once removed and so remain, save the cornices or any other portions of the defendants' building itself, so projecting beyond said line, which are to be removed whenever the plaintiffs remodel or otherwise change the front of their building, and no lapse of time hereafter shall affect the rights of the plaintiffs to have this part of this decree enforced.

"Third. That the defendants shall not by themselves, their tenants or agents, maintain the revolving fan in said bill described in any way which shall cause a current of heated or

impure air, or air charged with offensive smells, to strike upon or enter the opposite window of the plaintiffs.

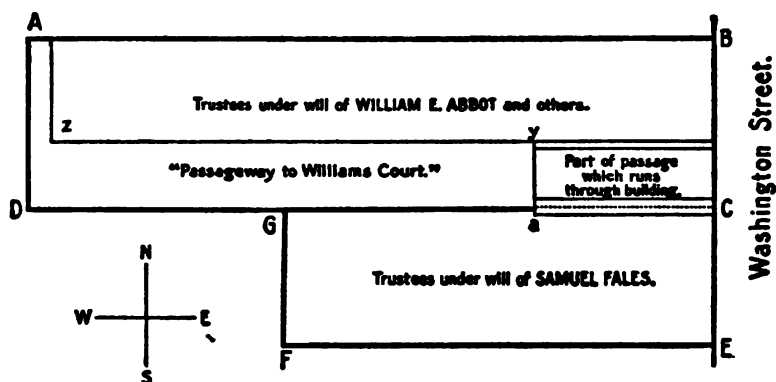
"Fourth. That the plaintiffs recover their costs, taxed at \$27.15."

The defendants appealed.

The plaintiffs appealed from so much of the decree as limited the injunction against discharging a current of air upon or into the plaintiffs' premises to a current of "heated or impure air, or air charged with offensive gases."

In the second case the justice made a decree that the bill be dismissed, with costs taxed at \$23.99. The plaintiffs in that case appealed.

The following sketch of the locus was printed in the brief of the plaintiffs in the first case :



The land of the Abbot estate, owned and occupied by the plaintiffs in the first case, is a parcel measuring thirty feet on Washington Street and one hundred and twenty feet in depth, shown by the lines *A B C D*.

The land of the Fales estate, owned by the defendants in the first case, adjoins the above to the southward, and is a parcel measuring twenty-four feet on Washington Street and somewhat over one hundred and three feet in depth. It is shown on the sketch by the lines *C E F G*.

The building on the Abbot estate is thirty feet wide on the front on Washington Street, and continues westward, to a depth of about forty feet from Washington Street, of this same width of thirty feet, built with a party wall on each side. At that

point it narrows and continues westward, about twenty feet wide, on the northerly part of the lot, leaving a strip ten feet wide along the southern side of the lot unoccupied by any building. This southern strip of the lot forms a passageway, continuing westward to Court Square, and reaching Washington Street to the eastward by passing directly through the Abbot Building.

The things complained of in the first case occurred at or in the party wall *C a*, near the point *C*.

The things complained of in the second case occurred on the northerly side of the passageway, at or near the point *y*.

It was stated in the bill in the first case that Williams Court is supposed to have been in or near the westerly side of what is now Court Square, and that sometimes the name Williams Court is applied erroneously to the passageway itself even as far eastward as Washington Street.

*W. W. Vaughan*, for Abiel A. Vaughan and others.

*B. E. Eames*, for Samuel W. Bridgham and others.

LORING, J. The plaintiffs and the defendants in the first suit are the owners and lessees of adjoining estates on the west side of Washington Street. The plaintiffs' lot is north of that of the defendants. A passageway ten feet wide (over and in which the defendants in the first suit had rights) runs through the plaintiffs' building next to the defendants' building. A part of the plaintiffs' building lies under and above the passageway. The dividing line between the two lots is the centre of a partition wall, and the northerly face of that partition wall makes the southerly face or side of the passageway.

The defendants placed a bar, certain brackets, signs and a cornice on the northerly face of this partition wall.

They also placed inside of their building an electric fan, "with the result," in the words of the memorandum of decision, "that a stream of air more or less heated and impure and charged with offensive smells is sent into and across the passageway into the plaintiffs' premises, thereby causing annoyance and discomfort to the plaintiffs and their tenants. I rule that the defendants have no right to so maintain and operate the fan as to send such a stream of air across the passageway into the premises occupied by the plaintiffs and their tenants, and that to do so constitutes an interference with and an invasion of the

rights of the plaintiffs and their tenants in the enjoyment of their property, for which they are entitled to relief. I rule that the defendants have a right to maintain windows and doors and other openings into and upon the passageway, for light and air, and to ventilate into the same by any proper means, if they do not thereby create a nuisance so as to interfere with the enjoyment by the plaintiffs and their tenants of the premises occupied by and belonging to them."

A final decree was entered, by which it was ordered, adjudged and decreed: (First) That the fee of the passageway was in the plaintiffs, subject to a right of way appurtenant to the estate of the defendants and others, the centre line of the party wall being the division line between the two estates; it was further ordered, adjudged and decreed that the passageway was subject also "to a right on the part of the defendants to maintain doors, windows, and other opening through said party wall for light and air, and entrance and exit, provided the strength of said wall is not diminished thereby, and to ventilate into the said passageway by any proper means, if they do not thereby create a nuisance so as to interfere with the enjoyment by the plaintiffs and their tenants of the premises occupied by and belonging to them"; (second) that the defendants have no right to maintain bars, brackets, fans, signs, cornices, on any portion of their building northerly of the centre line aforesaid; and (third) that the defendants "shall not by themselves, their tenants or agents, maintain the revolving fan in said bill described in any way which shall cause a current of heated or impure air, or air charged with offensive smells, to strike upon or enter the opposite window of the plaintiffs."

From this decree an appeal was taken by the defendants, and the plaintiffs took an appeal from so much of it "as limits the injunction against discharging a current of air upon or into the plaintiffs' premises to a current of 'heated or impure air, or air charged with offensive gases.'"

The defendants have attacked the third clause only of this decree.

Their contention is: "(1) That if the operation of this fan is to be restrained as a nuisance upon this bill and without further hearing, the record should be amended so as to leave no

doubt as to the ground upon which the decision rests. (2) The decree restraining the operation of the fan cannot be sustained on grounds of nuisance. (3) It cannot be sustained on grounds of trespass."

The bill went both on the ground that the current of air was a trespass and that it was a nuisance. From an inspection of the memorandum of decision (as to which see *Cohen v. Nagle*, 190 Mass. 4) and the decree, it is plain that the decree is founded on the ground that the current of air sent into the plaintiffs' store was a nuisance.

The defendants' first contention is that the decree cannot stand on the ground of nuisance because that would make the bill multifarious, since it proceeded on the ground of trespass with regard to this current of air and in seeking to have the bar, brackets, signs and cornice removed. It is enough to say of this contention that if that would have made the bill multifarious that objection was waived by the defendants when they went to a hearing on the merits. *Crocker v. Dillon*, 133 Mass. 91. *Pickett v. Walsh*, 192 Mass. 572, 579.

The second contention is that to cause a current of air to "strike upon . . . the opposite window of the plaintiffs" cannot be a nuisance. To "cause a current of heated or impure air or air charged with offensive smells to strike upon . . . the opposite window of the plaintiffs" is a nuisance if the plaintiffs elect, as they have a right to elect, to keep the window open.

So far as the plaintiffs' appeal is concerned, there is nothing before us from which we can say that the judge was wrong in coming to the conclusion that the defendants' right of ventilation included the right to project into the passageway pure air. For all we know, the evidence before him which is not before us justified that conclusion.

No argument has been made on the appeal in the second suit.

*Decrees affirmed.*



**JAMES J. COFFEY, administrator, vs. JOHN H. COFFEY  
& others.**

**Middlesex. December 4, 1906. — January 1, 1907.**

**Present: KNOWLTON, C. J., HAMMOND, LORING, BEALEY, & RUGG, JJ.**

*Executor and Administrator. Estoppel.*

An executor or administrator cannot be allowed by reason of his position of trust to gain an advantage which he would not otherwise possess in regard to his own indebtedness to the estate of his testator or intestate.

A son was the agent of his mother to collect rents, and during her lifetime without her consent but with the consent of his brother, then living, expended these rents upon property which he and his brother owned jointly. The brother died and his interest in the property on which the money had been expended passed to his children. Later the mother died intestate, and her surviving son was appointed the administrator of her estate. He and the children of his deceased brother were the only persons interested in her estate. The children of the deceased brother contended that the administrator should be charged in his account with the amount of rents collected by him before the death of the intestate and disposed of without her authority. *Held*, that he was none the less chargeable with the amount of such rents wrongly dealt with by him because the other persons interested in the estate had received the advantage of the wrongful expenditure in the same proportions in which they were entitled to share in the estate.

**APPEAL** from a decree of the Probate Court of the county of Middlesex allowing the first and final account of James J. Coffey as administrator of the estate of Bridget Coffey.

At the hearing before *Morton, J.* the following facts appeared: Bridget Coffey died on July 10, 1902, intestate, leaving as her heirs at law James J. Coffey, the administrator, and minor children of another son, John H. Coffey, brother of the administrator, who died in September, 1898. The only parties interested in the account were the accountant himself and the minor children of John H. Coffey, who were represented by a guardian. In the Probate Court the matter was sent to an auditor. The only item in dispute was that relating to the personal indebtedness of the administrator to the estate. The accountant testified that the rents of the estate of Bridget Coffey less expenses thereon collected by him during her lifetime until the death of John H. Coffey were applied by him in good faith with the assent of John H. Coffey in payment of claims on the Associate Building

property, in which James J. Coffey and John H. Coffey were interested equally, so that the children of John H. Coffey (the present contestants) actually received by inheritance their full share of the benefit thereof. This evidence was uncontradicted.

Upon that branch of the case the accountant requested the following ruling :

" If the rents of real estate of Bridget Coffey (less expenses thereon) collected by James J. Coffey down to the time of the death of John H. Coffey in September, 1898, were applied in good faith in payment of claims on the Associate Building property in which James J. and John H. were equally interested, so that the children of John H. (the present contestants) received by inheritance their full share of the benefit thereof, it would be contrary to the equitable principles, under which probate accounts are adjusted, to charge the same to the accountant in this proceeding, as that would be equivalent to double payment."

The justice refused to rule as requested, and made a decree charging the accountant with this and other amounts. The accountant alleged exceptions.

*C. H. Conant*, for the accountant.

*A. W. Putnam*, (*M. L. Sullivan* with him,) for the contestants.

RUGG, J. The facts disclosed in this case are that James J. Coffey acted as the agent for his mother, Bridget Coffey, in the collection of certain rents of real estate. Without her assent he expended these rents, with the consent of his brother then living, now deceased, who was the father of the present contestants, upon property in which he and his brother were jointly interested. The only question raised by the exceptions is whether these minor children, having received by inheritance the property upon which the expenditure was made, can insist that this indebtedness to the estate of their grandmother be paid by the accountant. The accountant's rights can be no greater than if he were not the administrator of the estate. He cannot be permitted by virtue of his trust position to gain an advantage, which he would not otherwise possess, with reference to his own indebtedness to the estate. *Stickney v. Clement*, 7 Gray, 170. If some other person than himself had been appointed administrator of the estate of Bridget Coffey, the facts, which the accountant proffered, would have constituted no answer by such appointee to

the claims of the present contestants. The accountant was dealing with the rents of his mother's property, in a way which he clearly had no right to do, and under such circumstances as to make himself indebted to her. It has chanced that his wrongful dealing with this income has, inadvertently and without any consent on their part or opportunity to prevent it, redounded to the advantage of the contestants. This accident cannot be used by the accountant to shield himself from the consequences of his own indebtedness to his mother nor enable him to enforce against the heirs of his brother a claim, which might or might not have turned out to be well grounded, if his brother had survived. *Abbott v. Foote*, 146 Mass. 888.

*Exceptions overruled.*

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ELLSWORTH P. SHERMAN, executor, *vs.* EDWARD M.  
SHERMAN & another.

Middlesex. December 6, 1906. — January 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

*Will. Evidence.*

At the trial of a probate appeal, upon the issue whether the instrument offered as a will was procured by the undue influence of the son of the testator, the contestants called the son as a witness and examined him at length as to his relations with the testator. During his cross-examination, after several objections to questions propounded by counsel, the presiding justice put the following question: "Now, in reference to the subject of influencing your father, or those things which might naturally tend to influence your father about the making of the will, did you say or do anything with a view to such influence?" The witness answered, "No, sir." The contestants excepted to the question. *Held*, that the intent of the witness was relevant and competent, and that the question was a proper one.

APPEAL from a decree of the Probate Court for the County of Middlesex allowing the will of George E. Sherman, late of Marlborough.

The case was tried in April, 1906, before *Knowlton*, C. J. upon the issue for the jury: "Was the execution of said instrument (the will) by said George E. Sherman procured by the undue influence of Ellsworth P. Sherman?" Ellsworth P.

Sherman was the son of the testator. He was called by the appellants and examined at length in regard to his relations with the testator. Thereafter, in the course of the cross-examination of this witness and after several objections to questions propounded by counsel, the Chief Justice put the following question: "Now, in reference to the subject of influencing your father, or those things which might naturally tend to influence your father about the making of the will, did you say or do anything with a view to such influence?" The answer was "No, sir." An exception was taken by the appellants to this question. No exception was taken to any part of the charge. The jury answered the issue in the negative.

*J. J. Shaughnessy*, for the appellants.

*J. E. Cotter*, for the appellee, was not called upon.

RUGG, J. The only point raised by these exceptions is whether the question to the witness Sherman was competent. This inquiry called for information, which would directly aid the jury in finding the truth as to the issue submitted to them. It had no tendency to elicit an answer, which would invade the province or usurp the functions of the jury. It required a statement of fact and not a conclusion as to the matters in dispute. The jury were required to determine whether the execution of the will was "procured by the undue influence" of the witness. These words in their ordinary significance import the doing of acts with a definite intent. It is familiar law that a witness may testify, whenever it is relevant, as to what his intent was. The question propounded by the court was in every respect unexceptionable.

*Exceptions overruled.*

**CORNELIUS F. CREEDEN vs. JOHN F. MAHONEY.**

**Essex. November 7, 1906. — January 2, 1907.**

**Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.**

*Deed, Delivery. Equity Jurisdiction, To remove cloud on title.*

If the owner of land executes an absolute deed of it without consideration, in order that the grantee may execute a mortgage of the land to secure money lent to the grantor, and has the deed recorded but retains possession of it, and the grantee at the request of the grantor executes the desired mortgage, the making of the mortgage constitutes an acceptance of the deed and the title passes to the grantee without any manual delivery of the instrument.

If the owner of land conveys it by an absolute deed to his brother in law without consideration, in order that the grantee may execute a mortgage of the land to secure money lent to the grantor, and has the deed recorded, and the grantee at the request of the grantor executes the desired mortgage, and afterwards refuses to reconvey the land to the grantor, the grantor cannot maintain a suit in equity against the grantee to have the deed cancelled as a cloud upon the plaintiff's title and to have it declared void except as against the mortgagee and those claiming under him.

**BILL IN EQUITY, filed November 23, 1905, as follows:**

"1. On or about the first day of January, 1898, the plaintiff, being desirous of, and for the purpose of, raising money upon the security of the land hereinafter mentioned, without doing so in his own name, caused to be written out a certain writing or instrument in the form of an ordinary warranty deed, a copy of which is hereto annexed, purporting to convey the land therein mentioned, to the defendant, with the intent and purpose that the defendant who was his brother-in-law, should, in his own name, execute a mortgage of said land, but for the benefit of the plaintiff.

"2. Said writing or instrument was never delivered to the defendant, or to any person for him, but the same has always been retained in the possession of the plaintiff, except that the same was sent to the registry of deeds for the southern district of the county of Essex, to be recorded.

"3. Said writing or instrument is recorded with Essex, South District, Deeds, in book 1537, page 6.

"4. The defendant never gave the plaintiff any consideration for the transfer of said land.

"5. Said land was never conveyed to the defendant and the plaintiff still retains possession, and always has retained possession, of the said land, and has always received all the rents and profits of the same.

"6. The defendant, after the making of said writing, to enable the plaintiff to raise money and for the purpose aforesaid, and for the benefit of the plaintiff as aforesaid, executed to the Newburyport Co-operative Bank, a corporation duly established by law and having its usual place of business at said Newburyport, a mortgage of said land to secure the payment of the sum of twelve hundred dollars, and the plaintiff received said sum from said bank.

"7. Said mortgage is recorded with Essex, South District, Deeds, book 1688, page 593.

"8. The plaintiff has paid the interest on said mortgage and divers sums on account of the principal, and has paid all taxes, assessments, insurance, and other expense in or about or on account of said land.

"9. Said writing or instrument, recorded as aforesaid, a copy of which is duly annexed, as aforesaid, constitutes a real cloud on the title of the plaintiff to the land therein described.

"10. The defendant has been to no expense whatever in or about said land, and has done nothing whatever in the matter, except to execute said mortgage and the note accompanying it.

"11. The defendant refuses to reconvey said land.

"Wherefore the plaintiff prays —

"1. That said writing or instrument may be ordered to be cancelled and adjudged void and of no effect, except as against the said mortgage and persons claiming by, through or under said mortgage.

"2. That it may be adjudged and decreed that the defendant has no title in said land.

"3. That the defendant may be perpetually enjoined from making or attempting to make any conveyance of said land other than to the plaintiff or his order.

"4. For such further and other relief as the nature of the case may require." \*

The defendant demurred to the bill, and alleged as causes of demurrer:

First. That the plaintiff's bill sets forth no cause for equitable relief.

Second. That if the plaintiff is seeking to enforce a contract for the sale of land, tenements or hereditaments, or of any interest in or concerning them, he has alleged no promise, contract, agreement, memorandum or note thereof in writing signed by the defendant whom he seeks to charge or by any person thereunto by him lawfully authorized as is required by R. L. c. 74, § 1.

Third. That if the plaintiff is relying upon an express trust, it appears to be a trust concerning land, not being such as may arise or result by implication of law, and the plaintiff has not alleged any instrument in writing, signed by the defendant or by the attorney for the defendant, creating or declaring the trust as is required by R. L. c. 147, § 1.

Fourth. That the plaintiff has not alleged the facts upon which the allegation of non-delivery of the deed in question is based with that certainty and definiteness that the rules of pleading require.

In the Superior Court *Aiken*, C. J. sustained the demurrer, and made a decree for the defendant. The plaintiff appealed.

*H. I. Bartlett*, (*A. Withington* with him,) for the plaintiff.

*N. N. Jones*, for the defendant.

BRALEY, J. The plaintiff rests his claim to equitable relief upon the ground that the deed not having been delivered the defendant never became seised of the land, and the principal averments of the bill are, that for his own advantage he caused the deed to be made and recorded to enable the defendant to execute a mortgage of the land, which accordingly was done. If the making, recording, and subsequent retention of the deed by the grantor are acts consistent with his continued ownership,

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\* The plaintiff did not seek to recover the value of the land subject to the mortgage on the ground that the defendant had made an oral promise to reconvey it which he could not be compelled to perform on account of his setting up the statute of frauds. See *Cromwell v. Norton*, ante, 291.

it is settled that manual delivery of the instrument is not required to work a transfer, for acts of the grantee showing acceptance, when coupled with a purpose of the grantor to treat the deed as delivered, are sufficient to pass the title. *Harrison v. Phillips Academy*, 12 Mass. 456, 460. *Hedge v. Drew*, 12 Pick. 141. *Mills v. Gore*, 20 Pick. 28, 38. *Regan v. Howe*, 121 Mass. 424, 426. *Snow v. Orleans*, 126 Mass. 458, 457. *Meigs v. Dexter*, 172 Mass. 217. The express object of the conveyance was to invest the defendant with authority to convey the fee in mortgage, and the deed could not be effectual for this purpose and immediately thereafter become inoperative, for if the defendant once acquired title his title was not terminated by the execution of the mortgage. Upon its face, with the knowledge of the plaintiff, the mortgage purported to be the sealed instrument of the defendant, presumably with the usual covenants of warranty, and the acts of the plaintiff in placing the deed upon record, and then asking for the making, execution and delivery of the mortgage were concurrent. The plaintiff's case then must rest upon one of two theories, either the act of the defendant in mortgaging the property was intended to be purely that of a volunteer without any legal title, or the making and recording of the deed was for the express purpose of enabling him to give a valid mortgage. It is not to be presumed that the plaintiff intended to perpetrate a fraud upon the mortgagee by causing it to appear of record that the defendant was the owner, when in fact the title had not passed, even if under R. L. c. 127, § 5, as between himself and the mortgagee the mortgage would have been valid. *Stiff v. Ashton*, 155 Mass. 130, 133. The statute is intended to protect an innocent mortgagee who deals with the apparent owner of record, although subsequently it appears that the mortgagor was not actually seised at the time, and its provisions cannot be invoked by a landowner to prevent a change of title which otherwise had been effected at common law. The making of a conveyance in fee to empower the grantee to make another conveyance of a like estate legally includes on the part of the grantor the intention to treat the deed as conveying title, and hence as delivered, and while no person can be made an involuntary grantee and have a conveyance of land thrust upon him, assent may be shown by his conduct, and the subsequent convey-



ance by the defendant was an unequivocal act of acceptance. *Regan v. Howe, ubi supra. Gould v. Day*, 94 U. S. 405.

In *Barnes v. Barnes*, 161 Mass. 381, relied upon by the plaintiff as a binding authority in his favor, the plaintiff executed and recorded a deed to the defendant, intending at the time to pass the title, but after record received and retained possession of the deed. Some time after he informed the defendant of its existence, and spoke of the land as hers, and so far as possible she assented, but it was held that the conveyance never became operative, as the unexpressed intention of the grantor at the time of record did not constitute a delivery. But the present case goes much farther by showing affirmative acts participated in by both parties, which recognized a transfer of the title, even if a gift was not intended.

The instrument having been delivered and accepted, the plaintiff is estopped by his covenants from claiming the legal title, and the demurrer was rightly sustained. *Nourse v. Nourse*, 116 Mass. 101.

*Decree affirmed.*

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WALTER S. HODGDON & others vs. CITY OF HAVERHILL  
& others.

Essex. November 7, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Commonwealth. Constitutional Law. Armory. Militia. Tax.*

The Commonwealth cannot be impleaded in its own courts except by its consent clearly manifested by an act of the Legislature.

The Commonwealth cannot be made a defendant in a suit in equity under R. L. c. 25, § 100, by ten taxable inhabitants of a city or town, to restrain the alleged unlawful raising or expenditure of money or incurring of obligations.

The Legislature reasonably may treat the construction of armories as necessary for the maintenance of the militia in suitable efficiency, and accordingly they may order that public money raised by taxation shall be applied for this purpose.

The provisions relating to armories embodied in St. 1905, c. 465, §§ 110-123, and as now in force contained in St. 1906, c. 504, § 9, providing in substance that, if the city council of any city shall vote to have an armory constructed therein and shall designate the amount of the loan necessary therefor, the armory commissioners of the Commonwealth shall acquire a suitable lot of land in that city

and erect thereon an armory at the expense of the Commonwealth, that to meet such expense the Commonwealth shall issue its bonds as described in the statute, and that the amount required each year to pay the interest on such bonds and to establish a sinking fund for their final retirement shall be assessed by the Commonwealth upon the city until the debt has been extinguished, are constitutional.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on January 3, 1906, under R. L. c. 25, § 100, by ten taxable inhabitants of the city of Haverhill, against "the city of Haverhill, represented by Roswell L. Wood as mayor, and its boards of common council and aldermen by non-registered vote, and Arthur T. Jacobs as treasurer, the Commonwealth of Massachusetts, represented by Joseph N. Peterson, Josiah Prickett and George Howland Cox as armory commissioners, and Arthur B. Chapin as treasurer and receiver general, and John M. Roche armory contractor," praying that the statutes relating to the construction of armories shall be declared unconstitutional, that the defendants representing the Commonwealth be required to reimburse the city of Haverhill for all money expended on account of a State armory constructed in that city, for which the city council designated the sum of \$40,000 as the amount necessary for acquiring the land and erecting the building, for which amount the Commonwealth issued bonds under the statutes alleged to be unconstitutional, and that the defendants representing the city of Haverhill be required to convey the title of the armory land to the Commonwealth.

The case was heard by *Braley, J.*, who made a decree that the bill be dismissed. The plaintiff Hodgdon appealed.

*W. S. Hodgdon, pro se.*

*G. M. G. Nichols*, for the city of Haverhill, relied on the brief for the Commonwealth.

*D. Malone*, Attorney General, & *F. T. Field*, Assistant Attorney General, for the Commonwealth, submitted a brief.

**SHELDON, J.** This cause was heard before a single justice of this court upon the bill, the answer of the city of Haverhill, and a motion to dismiss by the Commonwealth, and comes before us upon the plaintiff's appeal from a decree dismissing the bill.

It is plain that the bill cannot be maintained against the Commonwealth. No statutory permission for such a procedure has been brought to our attention, nor are we aware of any legis-

lation authorizing it. In the absence of such legislation the Commonwealth cannot be impleaded in its own courts. *Nash v. Commonwealth*, 174 Mass. 385, 388, and cases there cited. As against the Commonwealth the bill rightly was dismissed.

As to the other defendants, although the petition is inartificially drawn and the prayers for relief are inappropriate, it may perhaps be treated as brought against the defendants other than the Commonwealth under R. L. c. 25, § 100, and as raising the question of the constitutionality of the statutes relating to the construction of armories. The statutes which were in force at the times of the passage by the city council of the order in question and of the issuing of bonds in consequence thereof by the treasurer and receiver general of the Commonwealth, are R. L. c. 16, §§ 106–112, and St. 1904, c. 371. These statutes, together with St. 1905, c. 891, were afterwards embodied in St. 1905, c. 465, §§ 111–115, and as now in force are contained in St. 1906, c. 504, § 9. In substance it was provided in these statutes that if the city council of any city shall vote to have an armory constructed therein and shall designate the amount of the loan necessary therefor, the armory commissioners of the Commonwealth shall thereupon acquire a suitable lot of land in that city and erect thereon an armory at the expense of the Commonwealth, the means to be obtained by an issue of bonds of the Commonwealth, and that the amount required each year to pay the interest upon such bonds and to establish a sinking fund for their final payment shall be paid by the city to the Commonwealth. The title to such land was to vest absolutely in the city; and an annual rent for the armory was to be paid by the Commonwealth to the city until the extinguishment of the debt created for its erection.

There is of course no contention that money can be raised by taxation for any other than a public purpose. *Opinion of the Justices*, 186 Mass. 608, and cases there cited. But it is equally undoubted that the maintenance of the militia is a public purpose for which taxation lawfully may be imposed. This is specified in art. 1, § 8 of the Constitution of the United States as one of the purposes for which the national Congress is given power to raise money. Our own Constitution expressly provides that the taxes, duties and excises which the General Court is

authorized to impose and levy are to be disposed of "for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof." Const. Mass. c. 1, § 1, art. 4. Further recognition of the militia as a means of public defence and provision for its control and organization are to be found in c. 2, § 1, arts. 7 and 10 of the Constitution and in arts. 4 and 5 of the Amendments thereto. And the Legislature may reasonably treat the construction of armories as necessary for the maintenance of the militia in suitable efficiency, and accordingly it may order public money raised by taxation to be applied for this purpose. This necessarily follows from the reasoning of the court in *Lowell v. Oliver*, 8 Allen, 247.

It is suggested however that these statutes ought to be adjudged unconstitutional because the maintenance of the militia and the construction of armories as incidental thereto are strictly for the defence and protection of the entire Commonwealth and not in any sense for the special or peculiar benefit of the city in which any special armory may happen to be situated. It is argued that the taxation to be imposed to meet the interest and finally the principal of the bonds here in question, being levied on the city of Haverhill only, cannot be said, in the language of the Constitution, c. 1, § 1, art. 4, to be "taxes, upon all the inhabitants of, and persons resident, and estates lying, within" the Commonwealth. But this contention may be satisfactorily answered.

In the first place it is to be observed that the statute provides that an annual rent is to be paid by the Commonwealth to the city in which the armory is erected, until the extinguishment of the debt created for its erection; that the armory is to be under the control of the adjutant general under the orders of the commander in chief; that all expenses of the care, furnishing and repairs of the armory are to be paid by the Commonwealth, and that no proceedings are to be had and no expenses for the erection of such an armory shall be incurred except in accordance with the previous vote of the city council. R. L. c. 16, §§ 107-119. St. 1904, c. 371. It is contended that a vote passed by the city council after the enactment of these statutes and in accord-

ance with the terms thereof may well, after the Commonwealth has acted thereon by issuing bonds in conformity with the terms both of the statute and of this vote, and after the making of a contract for the erection of an armory thereon, be regarded as constituting an express assent voluntarily given by the city, for a valuable consideration, to the Commonwealth, of the terms of which neither the city nor any of its inhabitants or taxpayers has the right to complain. *Prince v. Crocker*, 166 Mass. 347, 359, 360, and cases there cited. And the consideration, it is contended, differentiates the case at bar from *Stetson v. Kempton*, 13 Mass. 272, and the other cases in which that decision has been followed. *Freeland v. Hastings*, 10 Allen, 570. *Agawam v. Hampden*, 180 Mass. 528. *Lemon v. Newton*, 134 Mass. 476. *Flood v. Leahy*, 183 Mass. 232.

But without considering this contention, and apart from any question of the effect of the vote of the city council in this case, we are of opinion that the Legislature lawfully may either authorize or require cities or towns to construct armories for militia companies stationed therein. This is within the doctrine laid down in *Prince v. Crocker*, 166 Mass. 347; and so far as the decision in that case turned upon the fact that the subway there considered was to become the property of the city of Boston, it is equally applicable here, for under the statutes here in question the armory is the property of the city of Haverhill. R. L. c. 16, § 107. And see St. 1905, c. 465, § 112, and § 116 as amended by St. 1906, c. 504, § 9. Roads and bridges, no less than armories, are established for the common good, and for the use and benefit of all the inhabitants of the Commonwealth; but as to them, as was pointed out in *Prince v. Crocker*, *ubi supra*, "the doctrine is well established, in this Commonwealth and elsewhere, that the Legislature may prescribe what shall be done, and require cities and towns to bear the expense to such an extent and in such proportions as it may determine." And see the cases cited on p. 359. The reasoning of *Attorney General v. Williams*, 174 Mass. 476, 481, is to the same effect. It there was said by the present Chief Justice of this court: "The Legislature may change the political subdivisions of the Commonwealth by creating, changing, or abolishing particular

cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *Kingman, petitioner*, 153 Mass. 566, and cases and statutes there cited. It does not depend upon the clause of the Constitution which authorizes the imposition of taxes, but upon the more general provisions defining the power of the Legislature." Such legislation has been too often sustained by this court to require further citation of cases. The latest case in which its validity was assumed was *County Commissioners of Bristol, petitioners, ante*, 257, decided since this case was argued. It is now beyond a doubt that within reasonable limits the Legislature may apportion burdens like this, in such a manner as in its judgment will best tend to secure fairness and equality. *Lowell v. Oliver*, 8 Allen, 247. And, as was pointed out in *Bryant v. Palmer*, 152 N. Y. 412, 416, while it is true that the main object of keeping up the militia is to provide for the defence and protection of the whole people, there is yet special advantage to those communities in which organizations of the militia are stationed, and in which armories have been constructed for the accommodation of those organizations; and the Legislature properly may consider this local advantage in apportioning the burden of taxation for this purpose. The same general doctrine is maintained in *Kingman, petitioner*, 153 Mass. 566; *Adams, petitioner*, 165 Mass. 497, 499; *De Las Casas, petitioner*, 178 Mass. 218, 218, and 180 Mass. 471. Nor is it any objection to the validity of this legislation that the money is to be raised in the first instance by an issue of bonds to be made by the Commonwealth, while the city is to be charged with the annual interest upon these bonds and to provide a sinking fund for their final redemption. This is fully within the principle declared in *Kingman, petitioner*, 153 Mass. 566, 578. Whether it was the wisest manner of raising the needed money was wholly for the Legislature to determine.

The decisions in *Hubbard v. Fitzsimmons*, 57 Ohio St. 486, and *State v. Dickenson*, 44 Fla. 623, under the constitutions of those States come to a different conclusion from that which we have reached. So far as the reasoning of those cases is at variance with our conclusion, we do not think that it should be followed in preference to our own decisions already cited. A

fundamentally different view seems to have been adopted in those States from that which has prevailed here, perhaps because of the difference of their constitutions and statutes from ours. Indeed, in *Hubbard v. Fitzsimmons*, at page 448 of the report, it seems to be assumed that in Ohio a court house for the use of the Supreme Court could not be erected at the expense of the county.

We are of opinion that these statutes are constitutional and valid.

Some objections have been taken to the proceedings which have been had in this case. The St. of 1904, c. 871, required simply a vote of the city council of Haverhill; no special manner of taking that vote and no particular majority in either branch of the city council was required. And it ought not to be necessary to say that we cannot consider on this bill any objections to the qualifications of any of the public officers whose acts are here in question, or to their good faith in the performance of their official duties.

The order dismissing the bill must be

*Affirmed.*

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MARY U. SHANAHAN vs. BOSTON AND NORTHERN STREET  
RAILWAY COMPANY.

PATRICK J. SHANAHAN vs. SAME.

Essex. November 7, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Practice, Civil, Docket entries, Appeal, New trial.*

The docket entries in a case until extended constitute the record of the proceedings. Under R. L. c. 178, § 96, an appeal from a judgment of the Superior Court raises such questions of law as are disclosed by the record.

On a motion for a new trial by a plaintiff after a verdict for the defendant, the presiding judge has no power to make an order granting the motion unless on or before a certain date the defendant consents to the entry of judgment in favor of the plaintiff for a sum named.

Where, on a motion by a plaintiff for a new trial after a verdict for the defendant, the presiding judge made an order granting the motion unless on or before a

certain date the defendant consented to the entry of judgment in favor of the plaintiff for a sum named, and the defendant so consented if the judge had power to make the order, and the order was vacated as beyond the power of the judge, it was ordered that the motion for a new trial should stand for a further hearing.

BRADLEY, J. These are actions of tort brought by husband and wife to recover damages for personal injuries caused to her by the negligence of the defendant, and for consequent loss of consortium by him. In the Superior Court verdicts having been returned for the defendant, the plaintiffs severally moved for a new trial. Thereupon an order was entered granting the motions unless on or before a certain date the defendant consented to the entry of judgment in favor of the plaintiff in the first case for \$200, and in the second for \$50. The plaintiffs seasonably appealed to this court, and the defendant having consented to the terms imposed, judgment was entered accordingly, and the cases are before us on a copy of the docket entries, supplemented by an agreed statement of the parties sanctioned by the presiding judge. This enumerates substantially the above recitals, with a further stipulation that if the additional orders lawfully could have been made then the judgments are to be affirmed, if not, then such order may be entered "as law and justice require."

Until formally extended these entries constitute the record, and although the plaintiffs might have alleged and saved exceptions, yet as the entire proceedings are set forth any question of law disclosed is properly before us on the appeal. *De Montague v. Bacharach*, 187 Mass. 128, 133. *Warburton v. Gourse*, ante, 203. R. L. c. 173, § 96. *Fay v. Upton*, 153 Mass. 6. *Corsiglia v. Burnham*, 189 Mass. 347. Upon this record the granting of a new trial because the verdicts "were against the evidence, the weight of the evidence and the law" was discretionary, and by the exercise of this discretion in favor of the plaintiffs they were neither aggrieved, nor did the defendant have any right of exception. *Borrowscale v. Bosworth*, 98 Mass. 84. *Commonwealth v. Morrison*, 134 Mass. 189, 190. *Hill v. Greenwood*, 160 Mass. 256. If the order had not gone further, the plaintiffs then would have had the right again to present their cases to a jury for whose determination of the facts they had seasonably asked. After having decided that a new trial



should be granted, the scope of the order upon the defendant's assent to its terms was nullified by an assessment of damages which deprived the plaintiffs of the right previously conferred. Besides, the judicial action, taken after the determination had been reached to set the verdicts aside, substituted for the verdict of a jury a finding by the judge which the plaintiffs were not compelled to accept, nor could they thus be deprived of their constitutional right. *Hubbard v. Lamburn*, 189 Mass. 296. These cases are to be distinguished from those in which after a verdict for the plaintiff the defendant asks for a new trial, and the option is given to the plaintiff upon filing a remittitur in excess of a certain sum to retain the verdict, or otherwise the motion will be granted. In such cases the question of liability already has been determined in the plaintiff's favor. He may prefer to remit a portion of the damages rather than take the hazard of another trial, but in any event his freedom of choice remains uncircumscribed. By R. L. c. 173, § 112, this practice is sanctioned and established, but the statute does not confer the right even with the assent of the defendant to impose upon a plaintiff the involuntary acceptance of an assessment to be ascertained by the judge where the verdict of the jury has been adverse. The discretion is unimpaired to grant or refuse a new trial which includes the re-submission of the issues of liability and of damages, although as yet no damages have been assessed, but upon the assumption that the defendant is liable, then to abrogate the effect of the order by proceeding to assess damages leaves nothing remaining upon which the order can operate, and this course cannot be taken without the concurrence of both parties.

In *Belt v. Lawes*, 12 Q. B. D. 356, 358, it was decided that after a verdict in his favor an option to remit damages could be lawfully granted to a plaintiff without the defendant's consent, and in delivering his judgment it was suggested by the Master of the Rolls that it was within the power of the court to compel a plaintiff to accept a certain sum as damages if the defendant consented, but the decision is no longer an authority, having been overruled by the case of *Watt v. Watt*, [1905] A. C. 115, in which it is held that without mutual consent the court has no authority to grant a new trial upon the first condition.

The order in each case must be vacated, and the motions are to stand for further hearing.

*Ordered accordingly.*

*W. A. Kelley*, for the plaintiffs.

*S. Parsons & H. A. Bowen*, for the defendant.

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ELIZA CAHILL vs. NEW ENGLAND TELEPHONE AND  
TELEGRAPH COMPANY.

Essex. November 8, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Negligence. Telephone Company. Electricity.*

A woman, who is employed by a telephone company as a toll operator at its telephone exchange in a city, assumes the ordinary risks of nervous annoyance and irritation reasonably connected with the performance of her duties, but does not assume the risk of a shock from an electric current which produces bodily prostration.

In an action by a telephone operator against her employer for personal injuries from a severe shock of electricity, if the plaintiff introduces evidence of a defect in the apparatus of which the defendant knew or in the exercise of due diligence ought to have known, so that it might be found that the shock was caused either by a want of repair or a lack of proper adjustment of the different parts, the question of the defendant's negligence is for the jury.

In an action at common law by a telephone operator against her employer for personal injuries from a severe shock of electricity, there was evidence that the plaintiff was employed as a toll operator at the defendant's telephone exchange in a city, that on the night before and during the morning of the day of the accident the plaintiff had reported to the chief operator that while at work at a certain switchboard she had received at times sensations not before noticed, although she previously had used this switchboard a part of every day for at least a week, and that these sensations, while not producing a shock, caused a "jarring and a grinding or rumbling in the ear" which at times caused her head to ache, that at the time of the accident she was sitting in front of this switchboard attending to calls, that, upon receiving a call in which she heard the subscriber state the place with which he wished to be connected, there followed a sensation of "shocking and grinding" and then her head began to ache, her side hurt her, her arms "kind of tightening," and she partly lost consciousness. There also was evidence that for some time before the accident there had been complaints from the plaintiff and other employees to the persons in charge that this switchboard, or the system controlling the electric current, was not working properly, and that the persons in charge had made attempts to find out and remedy the difficulty. *Held*, that the jury could have found that the accident was of such a nature that it could not have occurred

unless the defendant had permitted the apparatus to become defective, and that the question of the defendant's negligence was for the jury; also, that the question, whether the plaintiff by continuing to use the switchboard, after she had reason to apprehend that something was wrong in the mechanism and had reported the previous disturbances to those who had been placed in charge by the defendant, assumed the risk of any subsequent injury, was for the jury.

**BRALEY, J.** This is an action of tort for personal injuries received by the plaintiff while at work in the employment of the defendant as a toll operator at its telephone exchange in the city of Lynn. In the Superior Court at the close of the evidence for the plaintiff, at the request of the defendant, a verdict was directed in its favor, and the case is before us on the plaintiff's exceptions to the ruling.

The notice required by R. L. c. 106, § 75, not having been given, the count under the statute was waived, and the case went to trial on the counts at common law. These in substance alleged that the defendant negligently failed to furnish a safe and suitable place in which the plaintiff could perform her work, and also had failed to maintain its wires, appliances and apparatus in proper condition, and carelessly had allowed them to become defective, whereby the plaintiff while in the performance of her service was injured by receiving a severe shock of electricity. The questions for decision are whether there was evidence of the defendant's negligence, and of the plaintiff's due care, requiring the submission of the case to the jury.

The testimony, which is reported at length, shows that the office used as an exchange was furnished with the usual equipment of wires, transmitters and switchboards, and that under normal conditions neither the instrumentalities nor the place where they were installed and used were unsafe. But, being charged with electricity, if either the installation or insulation was defective then upon the wires or the transmitters becoming overloaded the use of the apparatus might be rendered dangerous to the operator. By entering the defendant's employment the plaintiff assumed the ordinary risks of nervous annoyance and irritation that reasonably might be connected with the performance of her duties, but this did not include shocks from an electric current which could be found to have caused pronounced bodily prostration, even if the degree of voltage was not sufficiently high to imperil life.

There was evidence that on the night before and during the morning of the day of the accident the plaintiff had reported to the chief operator that while at work on the sixth switchboard she had received at times sensations not before noticed, although she previously had used this switchboard a part of every day for at least a week, and that these sensations while not producing a shock caused "a jarring and a grinding or rumbling in the ear" which at times caused her head to ache. While at work she sat in front of this switchboard attending to calls for the connection of local subscribers with places out of town, and wore upon her head, held in place by a steel spring, a light telephone receiver connected with the switchboard by a cord. Upon receiving a call in which she heard the subscriber state the place with which he wished to be connected there followed, according to her testimony, a sensation of "shocking and grinding . . . and then my head commenced to ache and then my side hurt me and then my arms, kind of tightening." In response to the question "Did you lose consciousness then," she replied "Well, I don't think I did wholly." It appeared from the testimony of one of the defendant's chief operators that if complaints were received that shocks of more or less severity were experienced by employees it was his duty to examine into the cause, and remove the difficulty if it could be done, or if not to "report the trouble to headquarters." Notwithstanding there was evidence that disagreeable and annoying noises from the clicking, ringing or buzzing of the apparatus as well as slight shocks were neither uncommon nor dangerous, none of the witnesses testified that these occurrences included the passing of a current of the force described, and it could have been found that the shock received by the plaintiff was not only unusual in severity, but dangerous, and would not have taken place if the apparatus had not been defective. *Doyle v. Boston & Albany Railroad*, 145 Mass. 386, 388. *Griffin v. Boston & Albany Railroad*, 148 Mass. 143. *Graham v. Badger*, 164 Mass. 42. *Carter v. Boston Towboat Co.* 185 Mass. 496, 498. *Manning v. West End Street Railway*, 166 Mass. 280, 231. *Melvin v. Pennsylvania Steel Co.* 180 Mass. 196. *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, 574. For some time before the accident there had been complaints from the plaintiff and other employees to the principal operators that this switch-

board, or the system controlling the electric current, was not working properly, and attempts had been made by them to find and remedy the difficulty. The making of occasional repairs and replacements required by the daily use and wear of the system could be delegated to servants, but it was the duty of the defendant not only to provide suitable apparatus, but thereafter to maintain it in a state of proper repair so that it could be operated safely. *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198, 204. *Moynihan v. Hills Co.* 146 Mass. 586, 591. *Ellis v. Thayer*, 188 Mass. 309, 311. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580, 582. A failure to perform this duty shown by the defective condition described, would be evidence of negligence, and beyond proof of a defect existing in the apparatus of which the defendant knew, or in the exercise of due diligence ought to have known, the plaintiff was not required to go. If the shock was caused either by a want of repair or of a proper adjustment of the different parts the question of the defendant's negligence was for the jury to determine. *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407, 409. *Lemey v. Boston & Maine Railroad*, 167 Mass. 254, 257, 258. *Melvin v. Pennsylvania Steel Co.*, *ubi supra*. *Dronney v. Doherty*, 186 Mass. 205, 207. *Mehan v. Lowell Electric Light Co.* 192 Mass. 58.

The argument of the defendant that the injury might have been caused by the negligence of fellow servants, either from a failure of the chief operator, or of the switchboard inspector to perform their duty, or that of a workman who upon being directed to repair the defect had performed his work carelessly, or by some wrongful interference with the system by a stranger, is not relevant, as the defendant offered no explanation of this character concerning the accident which the jury could have found was of such a nature that it would not have occurred unless the defendant had permitted the apparatus to become defective. *Griffin v. Boston & Albany Railroad*, *ubi supra*. *Copithorne v. Hardy*, 178 Mass. 400, 401. *Pinney v. Hall*, 156 Mass. 225. *Hofnauer v. R. H. White Co.* 186 Mass. 47.

It further is contended that by continuing to use the switchboard after she had reason to apprehend that something was wrong in the mechanism the plaintiff assumed by her conduct the risk of any subsequent injury. If after reporting the pre-

vious disturbances to those who had been placed by the defendant in charge she continued at work, the question whether she knew and appreciated the danger was for the jury. *Wagner v. Boston Elevated Railway*, 188 Mass. 437, 441. *Peterson v. Morgan Spring Co.* 189 Mass. 576, 579. *Moylon v. D. S. McDonald Co.* 188 Mass. 499. *Finnegan v. Wilson Skate Manuf. Co.*, *ubi supra*. *Urquhart v. Smith & Anthony Co.* 192 Mass. 257.

*Exceptions sustained.*

*R. L. Sisk*, for the plaintiff.

*H. W. Dunn*, (*C. H. Walker* with him,) for the defendant.

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FRANK E. HAWKES vs. ANNIE KEHOE & another.

Norfolk. November 14, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Contract, Performance and breach, Construction.*

In this Commonwealth, where there is a contract for the conveyance of land with the buildings thereon for an entire price and the value of the buildings constitutes a large part of the total value of the estate and an important part of the subject matter of the contract, and before the time fixed by the contract for the conveyance the buildings are destroyed by fire without the fault of either party, the contract no longer is binding, because a substantial part of its subject matter has ceased to exist.

Where one agrees to convey a certain parcel of land "and the buildings thereon" on a certain day in exchange for a conveyance of other real estate, and the buildings are almost of equal value with the land, and the contract provides that the premises at the time of delivering the deeds are to be "in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted," and before the day named for the exchange of the deeds the buildings are destroyed by fire without the fault of either party, the failure to convey the land with the buildings thereon is not a breach of the contract, because in making it the parties contemplated the continued existence of the buildings as the foundation of the agreement and provided only against a change in their condition while existing.

CONTRACT, for the alleged breach of an agreement in writing printed below. Writ dated June 13, 1905.

The defendant demurred to the declaration. The Superior Court overruled the demurrer as to the first and second counts,

and the plaintiff discontinued as to the other counts of his declaration. The breaches of contract alleged respectively in the first and second counts are stated in the next to the last paragraph of the opinion.

The contract declared upon was as follows:

"Agreement made this 12th day of May, A. D. 1905, between John P. Kehoe and Annie Kehoe of Revere, County of Suffolk and Commonwealth of Massachusetts, of the first part, and Frank E. Hawkes of Boston, County of Suffolk and said Commonwealth of the second part.

"The party of the first part hereby agrees to sell, and the party of the second part to purchase, a certain estate situated in Revere, County of Suffolk and said Commonwealth, and bounded as follows: A certain parcel of land containing 5964 square feet, more or less, and the buildings thereon, situated on the boulevard, and known and numbered as No. 241 Boulevard, and running through to Ocean avenue. Being the same premises adjoining the Johnstown Flood building.

"Said premises are to be conveyed on or before June 12, 1905, by a good and sufficient deed of the party of the first part, conveying a good and clear title to the same, free from all incumbrances except leases and taxes for the current year, and in consideration for such deed and conveyance, the party of the second part agrees to convey by a good and sufficient deed to the party of the first part a certain estate situated in Dorchester, County of Suffolk and Commonwealth of Massachusetts, bounded as follows: A certain parcel of land containing 21,192 square feet, more or less, of which 16,448 square feet, more or less, are situated on Fowler street, and the balance, 4744 square feet, more or less, are situated on Greenwood street, free and clear from all incumbrances except restrictions of record, if any, and taxes for the current year. And the said party of the second part agrees to pay in cash, in addition to said conveyance, upon the delivery of said deed by the said party of the first part, the sum of twelve thousand dollars.

"Full possession of all said premises, subject to occupancy of present tenants, is to be delivered to the respective parties at the time of the delivery of the said deeds, the said premises to be

then in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted, leases and rents, water insurance to be adjusted to date of transfer. All leases and rents start the first of May.

"The deeds are to be delivered and the consideration paid at the Registry of Deeds.

"In witness whereof the said parties hereto, and to another instrument of like tenor, set their hands and seals on the day and year first above written.

"In presence of  
F. C. N. Wilcox.

"John P. Kehoe [seal].  
Annie Kehoe [seal].  
Frank E. Hawkes" [seal].

The case was referred to an auditor who filed a report. He found that the plaintiff had no personal interest in the transaction, but acted merely at the request and for the benefit of A. Wilbert Starratt and William A. Woodman, both of Boston. The lots in Dorchester were owned of record by Woodman, who held title thereto for the benefit of himself and Starratt in equal shares, and these lots of land were at the time of the making of the contract, and on June 12, 1905, of a fair market value of \$3,100. The Revere property was owned by the defendant Annie Kehoe, and at the time of the making of the agreement consisted of fifty-nine hundred and sixty-four square feet of land on the Boulevard, so called, at Revere, bounded on the rear by a street known as Ocean Avenue, upon which land there was in the front a frame building with two stores on the first floor and four tenements above. On the rear of the land was a frame building known as the Nickel Palace, designed for theatre and other amusement purposes.

The auditor found that at the time of the making of the agreement and on June 12, 1905, the land was of a fair market value of \$10,000, and that at the time of the making of the agreement the buildings thereon were of a fair market value of \$9,000. On the night of June 3, 1905, these buildings on the premises of the defendant Annie Kehoe at Revere were wholly destroyed by an accidental fire and were not rebuilt.

The facts as to demand and refusal of performance are described sufficiently in the opinion.



The case was heard upon the auditor's report by *Aiken*, C. J. He admitted against the objection of the defendants the evidence of Starratt as to his interest in the contract for exchange and in the Dorchester land. He found as a fact that the defendants before the fire never knew of any one being interested in the agreement other than the plaintiff Hawkes.

The defendants asked for eleven rulings, of which the sixth and seventh, relating to insurance money, were given by the Chief Justice. The other rulings requested, which were refused by him, were as follows:

1. Upon all the evidence the plaintiff cannot recover in this action on either the first or the second count.

2. That the plaintiff was never ready or able to carry out or perform his part of the agreement declared on, and cannot recover in this action.

3. That the fact that one Starratt assumed to act for the plaintiff without the defendants' knowledge or consent and without any transfer of the agreement on the part of the plaintiff does not enable the plaintiff to maintain this action by any acts of Starratt.

4. The plaintiff being wholly irresponsible financially and unable to carry out his part of the agreement declared on cannot maintain this action, if made use of as an irresponsible man to sign the agreement by other parties who knew his irresponsibility, and never informed the defendants thereof.

5. If this action could be maintained by the plaintiff by reason of any acts of Starratt shown in the evidence the inability of Starratt on June 12, 1905, to pay the money agreed upon except upon a mortgage of the defendant's property at that time tentatively made, prevents the plaintiff from recovering in this action.

8. There is nothing in the agreement whereby the plaintiff can recover from the defendant by reason of the building upon the premises of the defendants being accidentally destroyed by fire before the termination of the agreement.

9. The accidental destruction by fire of the building on the defendants' land excused both the defendants and the plaintiff from the performance of the written agreement declared on.

10. The written agreement declared on was made by the plaintiff and the defendants upon the implied condition that

the buildings upon the defendants' land should be in existence at the time of performance, and their accidental destruction by fire before even any attempt at performance of the agreement on the part of the plaintiff renders the defendants not liable in this action.

11. The plaintiff upon all the evidence cannot recover on the second count.

The Chief Justice found that the plaintiff was entitled to damages from the defendants for failure to convey the premises in the condition in which they were at the date of the signing of the agreement, reasonable use and wear thereon excepted, and that they were not excused from performance thereof by reason of the fire; and found that the plaintiff was entitled to recover of the defendants the sum of \$3,900. He found for the plaintiff in that amount with interest; and the defendants alleged exceptions.

*H. Dunham, (B. B. Dewing with him,)* for the defendants.

*W. A. Rollins,* for the plaintiff.

SHELDON, J. One who has bound himself by a positive and absolute agreement for the performance of something not in itself unlawful is not released from his obligation by the mere fact that in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible; he must respond in damages for the breach of his agreement. *Harvey v. Murray*, 136 Mass. 377. *Drake v. White*, 117 Mass. 10. But it is equally well settled that where from the nature of the contract it appears that the parties must from the beginning have contemplated the continued existence of some particular specified thing as the foundation of what was to be done, then, in the absence of any warranty that the thing shall exist, the contract is to be construed not as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the accidental perishing of the thing without the fault of either party. Gray, J. in *Wells v. Calnan*, 107 Mass. 514, 516, quoting *Taylor v. Caldwell*, 3 B. & S. 826. The same doctrine has been affirmed in other decisions of this court. *Butterfield v. Byron*, 153 Mass. 517, and cases there cited. *Young v. Chicopee*, 186 Mass. 518. *Marvel v. Phillips*, 162 Mass. 399.

See also *The Tornado*, 108 U. S. 342, 351, 352; *Dexter v. Norton*, 47 N. Y. 62; *Krause v. Board of School Trustees*, 66 N. E. Rep. 1010; *Dow v. State Bank*, 88 Minn. 355; *Vogt v. Hecker*, 118 Wis. 306; *Krell v. Henry*, [1903] 2 K. B. 740; *In re Hull*, [1905] 1 K. B. 588. The misfortune which has occurred releases both parties from further performance of the contract and gives no right to either to claim damages from the other. *Elliott v. Crutchley*, [1903] 2 K. B. 476; *S. C.* [1904] 1 K. B. 565. We need not stop to consider the different rules which have been laid down in England and in this Commonwealth as to the right of either party, in such event, to recover for payments made or services rendered or materials supplied to the other before further performance has become excused. See the cases cited *supra*.

The plaintiff contends, however, that the rule which we have now stated does not apply to cases like this. He argues that in this Commonwealth, where a contract is made for the future conveyance of land with buildings standing thereon, with no provision as to the contingency of the buildings being destroyed by fire before the time appointed for the conveyance, the loss by such a fire falls wholly upon the vendor. *Wells v. Calnan*, 107 Mass. 514. *Thompson v. Gould*, 20 Pick. 134. From this he deduces the conclusion that the purchaser in such a case has a right either to require the vendor to make a conveyance of the land with compensation for the loss of the buildings, as in *Phinizy v. Guernsey*, 111 Ga. 346, or to hold the vendor in damages for failing, though by reason of his inability, to convey the estate, including both land and buildings, as he had agreed to do.

We need spend no time upon the numerous cases in England and in this country which the industry of counsel has brought to our notice as to the rights of parties to such agreements upon a total or partial destruction of the buildings by fire. See the cases collected in 29 Am. & Eng. Encyc. of Law, (2d ed.) 712 *et seq.*, and in Ames, Cases in Eq. Jur. 228, note 2. We are of opinion that in this Commonwealth, when, as in this case, the conveyance is to be made of the whole estate, including both land and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an

important part of the subject matter of the contract, it is now settled by the decision in *Wells v. Calnan*, 107 Mass. 514, that the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he has not protected himself by insurance, he can have no reimbursement of this loss: but the contract is no longer binding upon either party. If the purchaser has advanced any part of the price, he can recover it back. *Thompson v. Gould*, 20 Pick. 134, 138. If the change in the value of the estate is not so great, or if it appears that the buildings did not constitute so material a part of the estate to be conveyed as to result in an annulling of the contract, specific performance may be decreed, with compensation for any breach of agreement, or relief may be given in damages. *Kares v. Covell*, 180 Mass. 206. *Davis v. Parker*, 14 Allen, 94.

It is true, however, that the principle just stated would not be applicable to an agreement which contemplated and provided for the event which has happened, — if, that is, in such a case as this, the vendor has made himself answerable for the continued existence of the buildings. *Allyn v. Allyn*, 154 Mass. 570. The agreement in this case provides that the defendants shall convey to the plaintiff a certain parcel of land “and the buildings thereon,” and that the premises at the time of delivering the deeds are to be “in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted.” The plaintiff contends that these words were inserted for his protection (*Tripp v. Smith*, 180 Mass. 122, 126); that they constitute a part of the contract, and are not to be ignored; and that they are no less applicable when the buildings have been totally consumed than would be the case if they simply had been mutilated by tenants or charred by a small fire. And he claims that the exception of “reasonable use and wear of the buildings” furnishes an additional reason for holding that injury by inevitable accident is not excepted. *Harvey v. Murray*, 136 Mass. 377, 378. Accordingly he contends that he has a right to hold the defendants in damages for their failure to convey to him the estate with the buildings in the same condition that

they were in at the date of the contract. *Combs v. Fisher*, 8 Bibb, 51. *Green v. Kelly*, Spencer, 544. *Goddard v. Bedout*, 40 Ind. 114. *Morgan v. Hymer*, 18 Ky. L. R. 639. But of these cases *Combs v. Fisher* simply decides that after the vendor has recovered a judgment at law against the purchaser upon bonds given for the price for land and buildings, thus affirming the contract, the latter may in equity have his damages from the previous destruction of the buildings set off against such judgment. In *Goddard v. Bedout* the defendant had put himself in the position of a lessee, and it is pointed out in *Wells v. Calnan*, 107 Mass. 514, 517, 518, that cases in which a lessee is held to pay rent or make repairs notwithstanding the destruction of the buildings during the term are not applicable here. In *Morgan v. Hymer* there was an express covenant by the vendor to keep the house in good repair. *Green v. Kelly*, the only one of these cases which fully supports the plaintiff's position, was rested mainly upon the authority of cases as to tenants, which we have seen not to be applicable here. There is here no express agreement on the part of the vendors warranting the continued existence of the buildings on their land, and no provision relative to their destruction by fire, as there was in *Allyn v. Allyn*, 154 Mass. 570. The agreement seems rather to have been based upon the assumption that its subject matter, land and buildings, would continue in existence until the time should arrive for the making of the conveyance and to provide against any change in their condition while so existing being made or allowed by the vendors to the possible detriment of the purchaser. The parties contemplated this continued existence as the foundation of their agreement. It is as if in the case of *Dexter v. Norton*, 47 N. Y. 62, there had been inserted in the agreement a stipulation that the seller would not allow the cotton therein mentioned to become wet by salt water or depreciated in quality from other causes, but would deliver it in sound condition. All the reasoning in the opinion of the court in that case would remain unaffected and the decision must have been the same. In *Howell v. Coupland*, 1 Q. B. D. 258, the contract was for the future sale of certain potatoes, to be "good and marketable ware"; and this contract was held to be subject to the implied condition that the parties should be excused if before

breach performance became impossible from the perishing of the potatoes without default of the contractor. This case must stand in the same way as if a large and material part of the land had been swallowed up by an earthquake or some other convulsion of nature, perhaps leaving the buildings standing on what land was left; for *Wells v. Calnan*, *ubi supra*, has settled the rule in this Commonwealth that the destruction of the buildings is not to be distinguished from the loss of a material part of the land. All the arguments based upon this stipulation of the contract would be as applicable then as now; evidently they could not then avail, and they cannot avail now.

We need not consider the question whether it appeared that the plaintiff, having made no actual tender of performance and having no other ability to pay the necessary money than stated in the auditor's report, had put himself in a condition to maintain the action. Apparently, if the defendants had adopted the plaintiff's view, and had offered to make a conveyance to him with compensation for the loss of the buildings, he could not have obtained the money upon the proposed mortgage, for his arrangement with the intended mortgagor was based upon the contingency of the defendant's premises being conveyed in the condition in which they were when the agreement was signed. See *Foternick v. Watson*, 184 Mass. 187; *Lowe v. Harwood*, 139 Mass. 133, 135; *Gormley v. Kyle*, 137 Mass. 189; *Carpenter v. Holcomb*, 105 Mass. 280, 285; *Cook v. Doggett*, 2 Allen, 439, 441; *Buttrick v. Holden*, 8 Cush. 233; *Howland v. Leach*, 11 Pick. 151, 155.

The demurrer was rightly overruled. The first count simply sets out the agreement and avers that the plaintiff was ready and willing to carry it out and so notified the defendants, but they "flatly refused" to perform on their part. The second count avers in substance that the fire which destroyed the buildings was due to the defendants' negligence; and it also, like the first count, contains an averment that the defendants flatly refused to perform their agreement.

The order overruling the demurrer must be affirmed; and because of the failure to grant the first of the defendants' requests for instructions, the exceptions must be sustained.

*So ordered.*

JAMES C. GREEN vs. HAVERHILL AND AMESBURY STREET  
RAILWAY COMPANY.

Essex. November 14, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Street Railway.*

In an action against a street railway company for personal injuries from being run into by a car of the defendant, when the plaintiff had driven in an open wagon from a private driveway which was screened from view by a large clump of lilac bushes at the side of the road and led almost at a right angle into the highway on which the defendant's car was being operated, if there is evidence that the car was running very fast, that no gong was sounded, that the motorman did not see the plaintiff until he was close upon him, and that just before the accident he was looking away to one side and was talking to a young woman who sat near him, the question of the defendant's negligence is for the jury.

One who suddenly finds himself in a place of great peril and is obliged to act without time for reflection, when acting instantly or impulsively for self preservation, cannot be held to the same wisdom of choice as would be expected if he had time for deliberation, and, in the trial of an action brought by him for an injury caused by the alleged negligence of another, he may be found to have been in the exercise of due care, although his mistake of judgment resulted in the injury, if he was acting as a person of ordinary prudence might be expected to act in like circumstances.

In an action against a street railway company for personal injuries from being run into by a car of the defendant when the plaintiff had driven in an open wagon from a private driveway almost at a right angle into the highway on which the defendant's car was being operated, if there is evidence that the view of the plaintiff from the private driveway was so obstructed by trees and other objects that, if looking constantly, he could get only glimpses of an approaching car, that on the side of the road in the direction from which the car was approaching there was a large clump of lilac bushes which after he reached them cut off the plaintiff's view so that he could not see an approaching car until he was at the line of the highway and within nineteen feet of the defendant's track, that the plaintiff was seventy-two years of age and his hearing was slightly impaired, that his horse was a slow one, that as he was driving at a walk through the private way he looked and listened and did not see or hear the car, that when he was at the highway with his horse's head within ten feet of the rail, he saw a car rapidly approaching and tried with his whip to start his horse from a walk to cross the track quickly, and was struck by the car and injured. *Held*, that there was evidence for the consideration of the jury of due care on the part of the plaintiff; that, although it was probable that if the plaintiff had tried to stop his horse instantly the accident might have been avoided, yet he could not be required to exercise such wisdom of choice as would be expected if he had had time for deliberation, and the jury might find that he acted as a person of ordinary prudence might be expected to act in like circumstances.

TORT, for personal injuries from being run into by an electric car of the defendant between three and five o'clock in the afternoon of September 2, 1902, on a highway in the town of Salisbury leading from Smithtown in Seabrook, New Hampshire, to Salisbury and Newburyport, when the plaintiff, driving a horse in a democrat wagon, had emerged from a driveway leading from the premises of one Donnell and was crossing the track of the defendant. Writ dated October 10, 1902.

In the Superior Court the case was tried before *Pierce, J.* At the close of the evidence the defendant asked the judge to rule that there was no evidence that would warrant a verdict for the plaintiff, and that upon all the evidence the plaintiff could not recover. The judge refused to rule as requested and submitted the case to the jury. They returned a verdict for the plaintiff in the sum of \$738.83; and the defendant alleged exceptions.

*H. I. Bartlett*, for the defendant.

*R. E. Burke*, for the plaintiff, submitted a brief.

KNOWLTON, C. J. The plaintiff was injured by a collision with the defendant's car. The highway at the place of the accident runs northwesterly and southeasterly. The defendant's track is near the southwesterly side of the highway, and the plaintiff was driving through a private way that runs nearly at right angles to the road, from a house on the southwesterly side of the road. On the northwesterly side of the private way there is an orchard, and, separating the orchard from the highway is a wall, with a few shrubs and bushes growing along it. At the junction of the private way and the highway, on the northwesterly side of the private way, there is a large clump of lilac bushes, and the first rail of the defendant's track is nineteen feet from the line of the highway and from these lilac bushes. The defendant's car was running to the southeast, down a slight grade, and the collision occurred as the plaintiff was driving in a wagon, with a slow horse, from the private way into the street. The car had formerly been a horse car, and it had but four wheels. The question submitted to us is whether there was evidence that the defendant's motorman was negligent and that the plaintiff was in the exercise of due care.

There was evidence that the car was running very fast, that no gong was sounded, that the motorman did not see the plaintiff



until he was close upon him, and that he was looking away to one side and talking with a young woman who sat near him, just before the accident. He must have known that this was a dangerous place, where a team might drive out at any time. While the evidence was contradictory as to some of these things, we are of opinion that the jury might properly find that he was not in the exercise of due care.

A more difficult question is whether there was evidence of due care on the part of the plaintiff. According to the testimony, as he drove from the house to the highway, his view was so obstructed by trees and other objects that, if looking constantly, he could only get glimpses of the approaching car. He was seventy-two years of age, and his hearing was slightly impaired, although he testified that he could hear pretty well. He said that he looked and listened, as he was driving his horse at a walk through the private way, and did not see or hear the car. We are of opinion that the jury might find that he was in the exercise of due care in driving to the lilac bushes at the side of the road. According to all the testimony, at that point he could not see an approaching car until he was within nineteen feet of the track. His horse's head would then be within about ten feet of the rail, and somewhat nearer to the line of passage of the overhanging car. According to his account, he there for the first time saw the rapidly approaching car, and tried with his whip to start his horse from a walk, to cross the track quickly. Very likely if he had tried to stop the horse instantly the accident might have been avoided; but he suddenly found himself in a place of great peril, and was obliged to act without time for reflection. One acting instantly or impulsively for self-preservation, under such conditions, could not be held to such wisdom of choice as would be expected if he had time for deliberation. The jury might find that he acted as persons of ordinary prudence might be expected to act in like circumstances. Assuming that the weight of the evidence tends to support the defendant's contention that the plaintiff was not in the exercise of due care, we cannot say, as a matter of law, that there was nothing upon this issue for the consideration of the jury.

*Exceptions overruled.*

JAMES W. DUGAN vs. BLUE HILL STREET RAILWAY  
COMPANY.

Norfolk. November 14, 15, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, &amp; SHELDON, JJ.

*Carrier, Of passengers. Street Railway. Negligence. Practice, Civil, Exceptions.*

Whether a motorman in the employ of a street railway company while being carried on a car of the company upon an errand of his own after his day's work is done, under a pass by the terms of which he assumes all risk of accidents, has the rights of a passenger for hire, depends on the question of fact whether the pass was given him as a gratuity or whether it was issued to him as one of the terms of his employment; in which last case the clause in regard to his assumption of risk is not binding and he has the rights of a passenger for hire.

In an action against a street railway company for personal injuries incurred by a motorman in the employ of the defendant while being carried on a car of the defendant upon an errand of his own after his day's work was done, it appeared that the plaintiff was travelling on a pass by the terms of which he assumed all risk of accidents, that when the plaintiff first was employed by the defendant all employees while travelling for pleasure or on their personal business were transported free without passes, that at a time two or three years before the accident when the plaintiff went for his week's pay the paymaster threw out with the envelope containing his pay a pass like the one on which the plaintiff was travelling at the time of the accident, and that each year after that a similar pass was issued in renewal of it. The defendant asked the presiding judge to rule that the plaintiff was not a passenger for hire. The judge said, "This seems to be a question of law," to which the defendant assented. Thereupon the judge refused the request. In charging the jury the judge ruled that as matter of law the plaintiff was a passenger for hire, saying, "I have to rule one way or the other, it being agreed to be a question of law." The defendant did not object to this statement of the judge, but excepted to the ruling. *Held*, that whether the plaintiff was a passenger for hire was a question of fact depending on whether the pass was given him as a gratuity or was issued to him as one of the terms of his employment, so that the refusal to rule as matter of law that the plaintiff was not such a passenger was correct; that the defendant by assenting to the statement of the judge, either must be taken to have agreed that the judge should rule on the question of fact as if it were a question of law, and in this case the defendant's exception to the ruling that the plaintiff was a passenger for hire must be overruled, as on the question of fact this court could not say that the judge came to the wrong conclusion, or the defendant's counsel must be taken to have asked the judge to rule on the question as one of law because if it was a question of fact he did not care to go to the jury on it, in which case also the exception must be overruled.

TORT for personal injuries from a collision of two cars owned and operated by the defendant, on one of which the plaintiff was travelling in the manner described in the opinion between nine

and ten o'clock in the evening of October 10, 1904, as the car was proceeding along Washington Street from Mattapan to Canton. Writ dated January 20, 1905.

At the trial in the Superior Court before *Sherman, J.* the jury returned a verdict for the plaintiff in the sum of \$9,000; and the defendant alleged exceptions. The material facts and the course of the trial are stated and described in the opinion.

The face of the pass on which the plaintiff was travelling at the time of the accident was as follows:

"Blue Hill Street Railway Co. Pass *J. Dugan*, motorman (1904), until December 31, 1904, unless otherwise ordered. No. 641.

"*J. B. Huntoon*, Manager."

On the back of the pass was the following:

"Conditions: The person accepting this free ticket assumes all the risk of accidents; expressly agrees that the company shall not be liable under any circumstances, whether by negligence by their agents or otherwise, for injuries to the person, or for the loss of or injury to the property of the passenger using this ticket, and he agrees that as for him he will not consider the company as common carriers, or liable as such. If presented by any other person than the individual named thereon, the conductor will take up this ticket and collect fare."

*T. Hunt*, (*H. W. Palmer* with him,) for the defendant.

*G. F. Williams*, (*H. D. Crowley* with him,) for the plaintiff.

*LORING, J.* In the first count of the declaration on which alone the plaintiff went to the jury he declared on the ground that he was a passenger for hire. At the trial it appeared that he was a motorman in the employ of the defendant, riding on an errand of his own after his day's work was done, under a pass by the terms of which he assumed all risk of accidents.

The defendant operates an electric car line between Stoughton and Mattapan. The plaintiff entered the defendant's employ in the autumn of 1898, six years before the accident, which was on October 10, 1904. When the plaintiff was first employed by the defendant all employees were allowed at all times to ride for pleasure or on their own personal business without paying a fare. This continued until January, 1902, as we understand the bill of exceptions. At some time in January, 1902,

when the plaintiff went for his week's pay, the paymaster threw out with the envelope containing his pay a pass like the one on which the plaintiff was riding at the time here in question. Each year after that a similar pass was issued in renewal of it.

It appeared that the plaintiff lived at Canton, within three minutes' walk of the defendant's car barn at that place. As we understand it, in going from Mattapan to Stoughton you come to Canton before you reach Stoughton. The plaintiff testified on direct examination that a majority, and on cross-examination that all but one, of the defendant's employees lived in Canton; that the one who did not live in Canton lived in Stoughton; and that it did not make any difference in the rate of wages paid whether they lived in Canton or in Stoughton.

The plaintiff also testified that immediately after his employment: "I rode back and forward to my house and would ride down to my dinner and supper." By this we understand him to mean that he rode from the terminus in Stoughton to the car barn in Canton, and *vice versa*, to go to his work and to get his dinner and supper and to return to his home on the termination of the day's work.

At the conclusion of the testimony the defendant asked the presiding judge to rule that the plaintiff was not a passenger for hire. The judge said, "This seems to be a question of law," to which the defendant's counsel assented; and thereupon the judge said that he should rule against him.

When the presiding judge came to the part of his charge, in which he had to deal with the question of the plaintiff's being or not being a passenger for hire, he said: "I was asked to rule that he was bound by that pass and could not recover. I have to rule one way or the other, it being agreed to be a question of law, and our court have lately passed upon a similar case, and decided that the agreement on the pass does not excuse the defendant, and that they are liable just the same, and I need not go into the reason for that or the explanation. I have seen fit to rule that that does not excuse them, and so he is to be treated as though he were passenger."

The plaintiff had a verdict, and the case is here on an exception to the refusal to rule that the plaintiff was not a passenger

for hire; and secondly, on an exception to the ruling given by the presiding judge on that matter in his charge to the jury.

The rule on which the rights of the parties depend in such cases as that now before us is settled in this Commonwealth by the cases of *Quimby v. Boston & Maine Railroad*, 150 Mass. 365, and *Doyle v. Fitchburg Railroad*, 166 Mass. 492, and it is this: Where a pass is issued as a gratuity the clause providing that the holder assumes all risk of accidents is binding. *Quimby v. Boston & Maine Railroad*, 150 Mass. 365. But where such a pass is issued to an employee as one of the terms of his employment the clause is not binding. *Doyle v. Fitchburg Railroad*, 166 Mass. 492.

Which of these two was the fact in the case at bar was a question for the jury. It well might be found in the case at bar that the custom which had existed for three years at least before the first pass was issued to the plaintiff, by which the employees were to ride free at all times, had come to be generally understood by the railway company and its employees to be an implied as distinguished from an express term but still a term in the contract on which its employees were hired. Whether this inference should or should not be drawn under all the circumstances of the case was for the jury to decide. In this connection it was of importance that the plaintiff did not ask for a pass as a favor; and the way in which (as the plaintiff testified) the pass was first issued, to wit, "it was thrown out" with the pass and "nothing said," is of some consequence.

The only question of difficulty in the case is to decide how the exceptions now before us are to be disposed of.

If the only exception taken had been an exception to the refusal of the judge to rule that the plaintiff as matter of law was not a passenger for hire, no difficulty would arise. The exception should be overruled.

But the judge not merely refused to rule that as matter of law the plaintiff was not a passenger for hire. He went further and ruled that as matter of law he was a passenger for hire; and to this the defendant excepted.

Whether the plaintiff was or was not a passenger for hire was, as we have said, a question for the jury; and if there had been nothing else in the case the exceptions taken to the ruling that

as matter of law he was a passenger for hire would have to be sustained.

The difficulty arises from the fact that the judge in his charge, after stating that he had been asked by the defendant "to rule that he [the plaintiff] was bound by that pass and could not recover," said: "I have to rule one way or the other, it being agreed to be a question of law." On this bill of exceptions we must take it that this was assented to by the defendant.\*

If the result of this is that the defendant is to be taken to have asked the presiding judge to rule on this question of fact as if it were a question of law, we cannot say that the judge came to the wrong conclusion; and therefore the exception must be overruled. Again, if the result of this is that the defendant's counsel must be taken to have asked the judge to rule on this as a question of law because he did not care to go to the jury on it if it was a question of fact, the exception must be overruled.

We are inclined to think that the latter is the view which ought to be taken of the exceptions. In either event the entry must be

*Exceptions overruled.*

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### ARTHUR F. SULLIVAN vs. CRAVE AND MARTIN COMPANY.

Suffolk. November 15, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Practice, Civil, Exceptions.*

The refusal of a judge, after the filing of a bill of exceptions and more than twenty days after the verdict, to allow the amendment of the bill by the insertion of an exception to the exclusion of certain questions put to a deponent, is no ground for exception.

The admission at a trial of evidence which is admissible for a limited purpose and otherwise is immaterial, if the purpose for which it is admitted is pointed out carefully by the judge in his instructions to the jury, is no ground for exception.

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\* The defendant at the trial was not represented by the counsel who argued the case before this court.

CONTRACT to recover commissions for the sale of chocolate and cocoa while the plaintiff was selling the defendant's goods in the city of Boston. Writ in the Municipal Court of the city of Boston dated October 26, 1903.

On appeal to the Superior Court the case was tried before *Lawton, J.* It appeared that the defendant was a wholesale dealer and manufacturer of chocolate and cocoa in the city of New York; and that the plaintiff was its New England agent, having a place of business in the city of Boston, and acted as such agent for a period of about three years. In the course of the trial it appeared that the defendant disputed only two items of the plaintiff's claim, one for the sale of twenty-five thousand pounds of cocoa to the Ginter Grocery Company to be delivered by the defendant to the Ginter Grocery Company in such quantities as might be required from time to time, and the other for fifteen thousand pounds to be delivered by the defendant to the John T. Connor Company as might be required from time to time.

The jury returned a verdict for the plaintiff in the sum of \$1,149.97, and the defendant alleged exceptions, raising only the questions which are referred to in the opinion.

In regard to the amendment to the bill of exceptions offered by the defendant containing a statement of the exclusion by the judge of certain questions in the deposition of one Martin, mentioned in the opinion, the judge ruled that "the statement was not a claim of the exceptions saved at the trial to the exclusion of evidence in the deposition, the twenty days within which exceptions may be filed having expired."

The character of the evidence admitted by the judge for a limited purpose appears sufficiently in the opinion.

*H. N. Allin*, for the defendant.

*A. H. Russell & G. C. Coit*, for the plaintiff, were not called upon.

BRALEY, J. By R. L. c. 173, § 106, while exceptions taken at a trial must be reduced to writing, and the bill filed within twenty days after verdict, it is common practice at the hearing to determine whether they are conformable to the truth to allow amendments for the purpose of more fully or accurately stating the exceptions alleged. But if the statutory time has expired

an exception not stated originally cannot be added by way of amendment without the consent of the adverse party, and of the presiding judge. *Arvilla v. Spaulding*, 121 Mass. 505. *Currier v. Williams*, 189 Mass. 214. In the bill as filed the exceptions to the exclusion of the questions put to the deponent, Martin, were omitted, and as the time had expired within which they could be inserted as of right, the judge was not required to allow them, and having been properly disallowed they are not open for argument in this court. *Hector v. Boston Electric Light Co.* 161 Mass. 558, 560.

The remaining exceptions are not well taken. The action being for the recovery of a commission for a sale of goods on the defendant's account, evidence was admissible to show the history of their business relations which defined the nature and extent of the plaintiff's employment. *Howe v. Ray*, 113 Mass. 88, 91. Both parties in making sales of cocoa in this Commonwealth were required to comply with the provisions of R. L. c. 75, §§ 16, 18, prohibiting the sale of adulterated food. From the fragmentary statements in the exceptions, which do not purport to contain all the testimony, it is uncertain upon what ground the plaintiff contended that the notices sent by the public authorities to resident customers that the cocoa previously sold was impure were relevant, although the defendant had been informed of their contents. But after counsel for the defence either had declined to disclose his defence, or had stated his objection to be that the notices were not within the statute, or were immaterial, they were admitted solely as incidents connected with the plaintiff's agency in selling the defendant's goods.

This limited purpose having been carefully pointed out in the instructions, and the jury cautioned that the notices could not be considered as proof of the quality of the goods shipped under the sales upon which a commission was claimed, the defendant has no just ground of exception. *Burghardt v. Van Deusen*, 4 Allen, 374. *Kingman v. Tirrell*, 11 Allen, 97. *Worcester Coal Co. v. Utley*, 167 Mass. 558, 560. *Paquette v. Prudential Ins. Co.*, ante, 215.

*Exceptions overruled.*



## KATE THOMAS vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 15, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Street Railway. Evidence, Presumptions and burden of proof. Res Ipsa Loquitur.*

In an action by a woman passenger against a street railway company for personal injuries, the facts that, while the plaintiff was alighting from the front platform of a somewhat crowded car of the defendant, her dress caught, causing her to fall, that there were four other persons on the platform besides the motorman, and that the plaintiff was caught so firmly that some one pulled her toward the car to loosen her dress, do not warrant the inference that the plaintiff's dress was caught by something securely attached to the car, or that, if it was, the vestibule was defective, both of these conclusions being mere conjectures.

In an action by a woman passenger against a street railway company for personal injuries from a fall caused by the plaintiff's dress catching on something as she was alighting from the front platform of a car of the defendant, if there is nothing to show on what the plaintiff's dress caught or why it caught there, and the accident is not explained further, the plaintiff has failed to sustain the burden which rests on her, and a verdict must be ordered for the defendant.

The doctrine of *res ipsa loquitur* applies only where the accident is such that there is just ground for a reasonable inference that according to ordinary experience it would not have occurred without negligence on the part of the defendant.

TORT for personal injuries alleged to have been sustained by the plaintiff on January 6, 1904, at about six o'clock in the afternoon while she was alighting from a car of the defendant at or near the corner of Tremont Street and Union Park Street in Boston. Writ dated January 14, 1904.

In the Superior Court the case was tried before *Harris, J.* The plaintiff testified that at the time of the accident she lived at 8 Union Park Street; that she had been shopping and took a closed vestibule car opposite R. H. White's store on Washington Street; that she paid her fare and stood a little way from the front end of the car; that when she got to Union Park Street she went out of the front door of the car, as it was too crowded for her to go out of the rear door.

In regard to the manner in which the accident happened, she testified as follows: "I had to crowd past several to get through the first door, and, as I went to step down, I picked up my dress to escape the mud on the step, and I was caught and fell." She

further testified that there were four people on the front platform besides the motorman, and that she had her purse and several small bundles in her right hand, and picked her dress up with her left. She wore a short walking skirt of strong material. She testified that after her dress caught she said "don't start the car" as she saw that she was caught firmly, and was afraid that they would start the car and drag her. That some one pulled her toward the car to loosen her dress. She could not say just how long she was on the ground. It seemed "quite a time."

The only other testimony on the question of liability was that of one Miss Adams who was with the plaintiff and said that the car was crowded. She did not see the plaintiff fall and did not know how the accident occurred.

At the close of the plaintiff's case the defendant rested and asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling, and submitted the case to the jury, who found for the plaintiff in the sum of \$3,000. The defendant alleged exceptions.

*E. P. Saltonstall & S. H. E. Freund*, for the defendant, were not called upon.

*O. Storer*, (*R. H. Benny* with him,) for the plaintiff.

SHELDON, J. There was no evidence to justify a finding by the jury that the injury to the plaintiff was due to any negligence of the defendant. The car did not start while she was alighting; no act either of omission or of commission by any of the defendant's servants appears to have had anything to do with her fall. There is a total failure of evidence to sustain the burden which rested on the plaintiff. *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572. *Gleason v. Worcester Consolidated Street Railway*, 184 Mass. 290.

The plaintiff's counsel contends that from the facts that her dress was caught while she was alighting from the front platform of a somewhat crowded car, there being four other people on this platform beside the motorman, and that she was firmly caught so that some one pulled her toward the car to loosen her dress, the jury might infer that she was caught by something securely attached to the car; that the company or the motorman ought to have known that this thing was so attached to the

car, and so that the vestibule was defective and the company negligent in allowing such a condition of things to exist. But we think that each of these inferences was merely conjectural. *Barker, J. in Gleason v. Worcester Consolidated Street Railway*, 184 Mass. 290, 291. There are many appliances upon the platform and vestibule of a street car in good condition upon which a dress might be caught without any negligence on the defendant's part. There may be many things, articles of baggage, bundles or boxes, temporarily placed upon a front platform by passengers, without any such negligence. See *Cahn v. Manhattan Railway*, 76 N. Y. Supp. 893; *Howell v. Union Traction Co.* 202 Penn. St. 388; *Searles v. Manhattan Railway*, 101 N. Y. 661. This case is similar to *Jacobs v. West End Street Railway*, 178 Mass. 116, 119, in which the plaintiff tripped over something not identified, while alighting from a crowded rear platform; and there being no evidence of any defect in the platform, it was held that she could not maintain any action against the railway company.

Nor does the doctrine of *res ipsa loquitur* help the plaintiff. *Faulkner v. Boston & Maine Railroad*, 187 Mass. 254. As we have already seen, there is no just ground for a reasonable inference that according to ordinary experience the accident would not have occurred without negligence on the part of the defendant. *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572. *Obertoni v. Boston & Maine Railroad*, 186 Mass. 481. *Hill v. Iver Johnson Sporting Goods Co.* 188 Mass. 75.

In our opinion a verdict should have been ordered for the defendant.

*Exceptions sustained.*

## CATHERINE L. NEAS vs. MARY E. LOWELL.

Suffolk. November 15, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, &amp; SHELDON, JJ.

*Nuisance. Ice and Snow. Landlord and Tenant, Liability of landlord to third persons.*

Where a building having a steep and unguarded roof sloping toward the sidewalk of a highway is leased by its owner for a term of years, the lessor reserving the right at reasonable times to enter "to view the premises, and make repairs and improvements," the owner is not liable to one who is injured by a mass of snow sliding from the roof owing to the failure of the tenant after a severe snow storm to take the usual measures to clear away the snow so far as possible or to do anything to prevent such an accident.

TORT for personal injuries caused by snow falling upon the plaintiff from a building of the defendant. Writ dated February 9, 1897.

At the trial in the Superior Court before *Bond, J.* the plaintiff introduced evidence that the defendant owned a brick dwelling house numbered 363 on Tremont Street in the city of Boston; that the building was three stories high, constructed with a slate-covered pitched roof of the ordinary kind, slanting toward the sidewalk, the ridge pole being parallel therewith; that the roof had no protection or railing to keep snow from falling upon the sidewalk; that there was on the roof a dormer window facing the street, the window being directly at the eave of the roof; that there was a gutter running along the eave of the roof and slightly below the edge of the eave upon the front of the building; that the plaintiff at about eleven o'clock on the morning of January 29, 1897, was walking along the sidewalk of Tremont Street in the exercise of due care in front of this building when a large quantity of snow slid from the roof of the building upon her, throwing her to the ground and completely covering her, causing the injuries sued for; that on January 28 there was a heavy snow storm; that the 29th was a cold day and that at the time of the accident the thermometer stood at four or five degrees below freezing; that the weather on the 29th was blustering with considerable wind;

that the snow had not been cleared from the roof on the 28th or on the 29th; that the entire building at the time of the accident was occupied by one Latter, who was a tenant of the defendant; that living in the house as a lodger of Latter was one Scott; that after previous storms Scott at the request of Latter had attempted to remove snow from the roof; that on the forenoon of the 29th neither Scott nor Latter nor anybody else attempted to remove snow from the roof; that the only way any snow could be removed from any portion of the roof, without the use of ladders, was by opening one of the third story windows, leaning out, and by means of a pole knocking from the lower edge of the eave any snow or ice which had accumulated there; that by this means only such snow as was on the immediate edge of the eave or within a foot back from the edge could be removed; that while thus reaching out from the third story window and attempting to remove snow with a pole the head of the person using the pole would be about three feet beneath the eave of the roof; that the eave of the roof extended along Tremont Street about twenty-five feet; and that from the eave of the roof to the ridge pole was about fifteen feet.

The defendant offered in evidence the testimony of Latter, and introduced in evidence the lease from the defendant to him which contained the provision "that the lessor, or those having said estate in the premises with her servants, at reasonable times may enter to view the premises, and make repairs and improvements." The testimony of Latter tended to prove that the lease was executed on or about June 1, 1896; and that the roof of the building was in the same condition at the time of the execution of the lease that it was at the time of the accident; that Latter already had been in occupation of the premises for a year or two before the execution of the lease, and occupied the entire premises under the lease from its execution until the expiration of the term, including the date of the accident; that it was understood between the defendant and Latter that Latter was to take care of the property to the best of his ability; that at the time of the accident Latter was absent from the premises; that previous to the snow storm of the 28th Latter had been in the habit of, either himself or by his agent Scott, opening a window on the third story and reaching out by means of a pole and striking from the

edge of the eave of the roof such snow or ice as had accumulated on the edge of the eave; that if the snow was loose he could remove in this way only such snow as overhung the eave and extended back about a foot, but if the snow was covered with a crust it would break off where the crust gave way and come down in large pieces; that there was no other way that he could get snow off of any portion of the roof; that the face of the dormer window was right on the edge of the eave; that he never had attempted to remove the snow by the use of a pole from the dormer window, but if he had done so, he probably could have removed a little more than was possible from the third story window; that he never had made any effort to clear the roof except by the use of a pole in the manner indicated; and that he did not think it practical to remove the snow by the use of a ladder. It was agreed that it would have been possible to remove the snow from the roof by using a ladder of sufficient length. It appeared from other evidence that the distance between the eave of the roof and the sidewalk on Tremont Street was about thirty feet.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*M. M. Lynch & A. D. Moran*, for the plaintiff.

*F. J. Stimson, L. M. Stockton & F. J. Macleod*, for the defendant.

KNOWLTON, C. J. In all its material facts this case is like *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47. The construction of the building was in general the same, and the lease was the same. The only difference is that in the present case the method of preventing injuries from snow on the roof is shown by the evidence. The accident happened, not from the impossibility of removing the snow so far as necessary to prevent injury, but from the failure of the tenant to take the usual measures after a severe storm, or to do anything to prevent such an accident as happened. The testimony showed that, after a snow storm the tenant was in the habit of reaching out of the windows just below the eaves with a long pole, and using it to clear off the snow from the lower part of the roof. So far as appears, he was able in that way to remove all that accumulated to such a depth as to be dangerous. In the story above there was also a dormer window

in the roof, by the use of which, according to the testimony, a larger portion of the roof might have been cleared. From the fact that the tenant had never used this window for the purpose we must infer that he never had found it necessary so to use it. There was also testimony that the roof might have been cleared by the use of a ladder. All this testimony was uncontradicted. Because of the failure of the plaintiff to introduce evidence that the house was a nuisance at the time of the letting by the defendant, or that there was an existing condition of construction that the defendant intended to have used in such a way as to make it a nuisance, a verdict was rightly directed for the defendant. The case is covered by *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47. See also *Leonard v. Storer*, 115 Mass. 86; *Caldwell v. Slade*, 156 Mass. 84; *Dalay v. Savage*, 145 Mass. 38; *Szathmary v. Adams*, 166 Mass. 145; *Munroe v. Carlisle*, 176 Mass. 199.

*Exceptions overruled.*



HAGOP BOGIGIAN vs. BOOKLOVERS LIBRARY.

BOOKLOVERS LIBRARY vs. HAGOP BOGIGIAN.

Suffolk. November 15, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Frauds, Statute of. Words, "Consideration."*

In an action for the alleged breach of an oral contract to take from the plaintiff a lease of a certain store and to furnish a guarantor of the rent, if the defendant sets up the statute of frauds and it appears that the plaintiff refused to give a lease to the defendant because the defendant failed to furnish a guarantor of the rent, the plaintiff cannot satisfy the statute by producing a letter signed by the defendant containing all the terms of the alleged oral contract except the agreement to furnish a guarantor.

In *Hayes v. Jackson*, 159 Mass. 451, the majority of the court did not decide that in the provision, now contained in R. L. c. 74, § 2, that a memorandum of a contract under the statute of frauds need not set forth the consideration, the word "consideration" means price, and it is the unanimous opinion of the court that the doctrine of *Hayes v. Jackson* should not be extended.

TWO ACTIONS OF CONTRACT, ONE for the alleged breach of an oral agreement to take from the plaintiff a lease of a store

at the corner of Beacon Street and Park Street in Boston and to furnish a guaranty satisfactory to the plaintiff for the faithful performance of the terms and conditions of the lease. Writ in the Superior Court dated April 16, 1903.

THE OTHER by the defendant in the first named case to recover \$500 paid for the first month's rent under a lease, on the ground that the negotiations between the parties had resulted in no lease or contract. Writ in the Municipal Court of the City of Boston dated February 17, 1902.

The last named case having been appealed to the Superior Court, the cases were tried together in that court before Fox, J. At the close of the evidence, the judge ordered a verdict for the defendant in the first named case, on the ground that there was not a sufficient memorandum in writing of the agreement declared on to satisfy the requirements of the statute of frauds. The plaintiff alleged exceptions.

In the last named case the judge submitted to the jury the question, "Did the parties come to any agreement as to the terms and conditions of the letting?" The jury answered "No." The jury returned a verdict for the plaintiff in the sum of \$575; and the defendant alleged exceptions, which he afterwards waived before this court.

*F. H. Nash*, for Bogigian.

*G. W. Anderson*, for the Booklovers Library, was not called upon.

LORING, J. The first of these two cases is an action to recover damages for not taking a lease of a store owned by the plaintiff. The contract sued on was made by word of mouth. The defendant refused to furnish a guarantor of the rent to be paid, claiming that the oral agreement did not require it to do so. The plaintiff refused to give a lease without a guaranty of the rent and brought this action against the defendant for not taking a lease and furnishing a guaranty of the rent therein specified.

The defendant set up in defence the statute of frauds, R. L. c. 74, § 1, cl. 4. To meet this defence the plaintiff produced a letter signed by the defendant, in which all the terms of the oral contract insisted upon by the plaintiff were set forth except the furnishing of a guarantor.



The presiding judge ruled that this letter was not a memorandum or note of the oral contract sued on, and directed a verdict for the defendant.

The plaintiff, who refused to give the lease because the oral contract required a guarantor, still insists that this letter which does not state that a guarantor is required is a memorandum of the oral contract sued on.

The plaintiff's contention is (1) that "the consideration of such" "contract" which by force of R. L. c. 74, § 2, may be proved by any legal evidence, means, in case of a contract within R. L. c. 74, § 1, cl. 4, the price to be paid for land or the interest therein covered by a contract, and (2) that the conclusion here contended for is the logical result of the construction given to that act in *Hayes v. Jackson*, 159 Mass. 451, by a divided court.

If the "consideration" mentioned in R. L. c. 74, § 2, means in all cases the price of the land to be conveyed under a contract described in R. L. c. 74, § 1, cl. 4, the result is that a promise to pay for land is not within the statute of frauds at all. The plaintiff in no event has to sign a memorandum to satisfy the statute of frauds. The statute is satisfied if a memorandum is signed by "the party to be charged therewith," that is, by the defendant. If the price of land may in all cases be proved by parol, the statute of frauds does not apply at all to an action to recover the price of land.

No case has been cited by the plaintiff in which it is held that "consideration" in R. L. c. 74, § 2, means price. Not only has no case been cited where it is held that the fourth clause of the first section of our statute of frauds does not apply to an action for the price, but the contrary heretofore has been assumed to be the settled law. See for example *Morton v. Dean*, 13 Met. 385.

More than that, it seems reasonably plain that the majority of the court in *Hayes v. Jackson*, 159 Mass. 451, did not intend to decide that a promise to pay the price of land was not within the statute of frauds. Holmes, J. says, in *Hayes v. Jackson*, 159 Mass. 451, 453: "In *Howe v. Walker*, 4 Gray, 318, Thomas, J. plainly indicated the opinion that § 2 of the statute applies in all cases, pointing out that this does not mean that when the parties are reversed the oral agreement will be sufficient to sue-

tain an action." And again, at p. 452, Holmes, J. said: "The defendant is sufficiently protected if all that he is to do is required to be in writing." These two statements at least imply that the "consideration," which by the statute may be proved by parol, is the consideration of the promise sued on, and that R. L. c. 74, § 1, cl. 4, applies as much when the vendee is sued "upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them" as when the vendor is sued on such a contract.

It would be an extension of the doctrine of *Hayes v. Jackson* to hold that "consideration" means price, and that R. L. c. 74, § 1, cl. 4, does not apply to an action against the vendee to recover the price or damages for breaking a contract to pay for an interest in land. It is the unanimous opinion of the court that the doctrine of *Hayes v. Jackson* should not be extended.

In the case at bar the letter relied on to satisfy the statute of frauds did not state all that this defendant was required to do. It was not a memorandum of the oral contract which the plaintiff alleged was made, and the ruling of the presiding judge was right.

Certain exceptions were taken during the trial to the exclusion and admission of evidence. The evidence in question does not affect the defence of the statute of frauds. Our conclusion that that defence is good renders those exceptions immaterial.

In the second case the exceptions were waived.

The entries must be

*In the first case, exceptions overruled; in the second case, exceptions waived.*

**JOSEPH BLACK vs. NEW YORK, NEW HAVEN, AND HARTFORD  
RAILROAD COMPANY.**

Suffolk. November 16, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Railroad. Proximate Cause.*

Where a passenger in a car of a train of a railroad company is so intoxicated as to be incapable of standing or walking or taking care of himself in any way, *semble*, that the conductor and brakeman of the train are under no obligation to remove him from the car when the train stops at his destination, but, if they voluntarily undertake to help him from the car, they are bound to use ordinary care not only in the act of his removal but also in selecting the place in which to leave him.

One, who suffers injuries while so intoxicated as to be incapable of standing or walking or taking care of himself in any way, may maintain an action against a person whose negligence in view of his manifest condition was the direct and proximate cause of his injuries.

If the conductor and brakeman of a local passenger train of a railroad company, on arriving at a station which is the destination of a passenger in one of the cars of the train, who is so intoxicated as to be incapable of standing or walking or caring for himself in any way, knowing this passenger's condition, take him out of the car and across the platform of the station and finally leave him half way up a flight of ten or twelve steps leading to the station above, and the passenger falls backward, strikes on the back of his head and is injured, in an action by the passenger against the railroad company for his injuries, it can be found that, in view of the plaintiff's manifest condition, the servants of the defendant were negligent in leaving him without a reasonable regard for his safety in a place where a fall would be likely to do him much harm; and it also can be found that the plaintiff was free from any negligence that was a direct and proximate cause of his injuries.

TORT for personal injuries alleged to have been caused by the negligence of the servants of the defendant on February 7, 1903, while the plaintiff was a passenger of the defendant. Writ dated March 20, 1903.

At the trial in the Superior Court *Wait*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions. The material evidence is described or quoted in the opinion.

*H. W. Dunn*, (*C. H. Walker* with him,) for the plaintiff.

*J. L. Hall*, for the defendant.

KNOWLTON, C. J. This action was brought to recover for an injury alleged to have been caused by the negligence of the defendant's servants. The plaintiff was a passenger on the defendant's train which ran from Boston through Ashmont on the evening of February 7, 1903. He testified to having become so intoxicated that he had no recollection of anything that occurred after leaving a cigar store in Boston, until he awoke in the Boston City Hospital, about four o'clock the next day. One Thompson testified "that he took the 9.23 train on the evening of February 7, 1903, at the South Station in Boston for Ashmont, and occupied a seat near the rear of the last car of the train; that there were about twenty passengers in the car and he noticed Black sitting in the seat opposite, very erect, with his eyes closed. When the conductor came through, Mr. Black went through his pockets as if he were looking for a ticket, and not being able to find it, tendered a fifty-cent piece in payment for his fare. The conductor begun to name off the stations from Field's Corner first and then Ashmont, and when he said 'Ashmont,' Mr. Black nodded his head. The conductor gave him his change and his rebate check. At Ashmont, where the train stops, there is a gravelled walk, running the whole length, as a platform, then there is a flight of steps, ten or twelve, that leads up to the asphalt walk around the station, so when you go up from the steps you have to walk along this walk. The conductor and brakeman took Black out of the car, with one on each side. The distance from the steps of the car to the steps that lead up to the station was twenty-five feet. As they went along the platform, the conductor and trainman were on each side of him. They tried to stand him up, but his legs would sink away from him. They sort of helped him up and carried him to the bottom of the steps. When they went to the bottom of the steps, they continued, one on each side of him. Then one of the men got on one side with his arm around him and the other back of him sort of pushing him, and they took him up about the fifth or sixth step, and after they got him up there, they turned right around and left him and went down the steps. Mr. Black sort of balanced himself there just a minute and then fell completely backward. He turned a complete somersault and struck on the back of his head. The railroad men just had

time to get down to the foot of the steps. There was a railing that led up those steps and the steps were about ten feet wide. Mr. Black was upon the right hand side going up and he was left right near the railing. When he fell, he did not seize hold of anything, his arms were at his side."

On this testimony the jury might find that the plaintiff was so intoxicated as to be incapable of standing, or walking, or caring for himself in any way, and that the defendant's servants, knowing his condition, left him half way up the steps where they knew, or ought to have known, that he was in great danger of falling and being seriously injured. They were under no obligation to remove him from the car, or to provide for his safety after he left the car. But they voluntarily undertook to help him from the car, and they were bound to use ordinary care in what they did that might affect his safety. Not only in the act of removal, but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition. The jury might have found that they were negligent in leaving him on the steps where a fall would be likely to do him much harm. *Moody v. Boston & Maine Railroad*, 189 Mass. 277.

The defence rests principally upon the fact that the plaintiff was intoxicated, and was incapable of caring for himself after he was taken from the train, and therefore was not in the exercise of due care. If his voluntary intoxication was a direct and proximate cause of the injury, he cannot recover. The plaintiff contends that it was not a cause, but a mere condition, well known to the defendant's servants, and that their act was the direct and proximate cause of the injury, with which no other act or omission had any causal connection. The distinction here referred to is well recognized in law. Negligence of a plaintiff at the time of an injury caused by the negligence of another is no bar to his recovery from the other, unless it was a direct, contributing cause to the injury, as distinguished from a mere condition, in the absence of which the injury would not have occurred. This is pointed out in *Steele v. Burkhardt*, 104 Mass. 59, and *Murphy v. Deane*, 101 Mass. 455. It is also considered at some length in *Newcomb v. Boston Protective Department*, 146 Mass. 596. See also *Marble v. Ross*, 124 Mass. 44; *Spofford v.*

*Harlow*, 3 Allen, 176; *Hall v. Ripley*, 119 Mass. 125; *Stone v. Boston & Albany Railroad*, 171 Mass. 536, 544.

The application of this rule sometimes gives rise to difficult questions. But in this connection the doctrine has been established that, when the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct and proximate cause of it. The principle was recognized by Mr. Justice Wells in *Murphy v. Deane*, 101 Mass. 455, in these words: "The last part of the instructions prayed for suggests another question, which, in certain conditions of facts, may require careful consideration; to wit, how far the obligations and liabilities of one party are modified towards the other, after knowledge of a negligent exposure, by the latter, to danger from the acts or neglect of the former. In such case, what would otherwise have been mere negligence may become wilful or wanton wrong; or may take the place of the sole direct or proximate cause; the negligence of the other party being then regarded as a remote, and not a contributory cause." In *Hibbard v. Thompson*, 109 Mass. 286, we find this language: "A physician may be called to prescribe for cases which originated in the carelessness of the patient; and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence, and the separate injury occasioned thereby. . . . In such cases, the plaintiff's fault does not directly contribute to produce the injury sued for." So in *Pierce v. Cunard Steamship Co.* 153 Mass. 87, this court said: "But here the ground is not the fire, but an act done by the defendant after Pierce had got into the dangerous position. . . . The plaintiff's previous negligence is not a sufficient excuse for knowingly inflicting an injury upon him, or, short of that, for omitting the use of such care as is reasonable under the circumstances to avoid injuring him, even when the harm is not expected in terms."

The rule applies, in like manner, where the plaintiff's act is illegal as distinguished from negligent, so that the defendant's liability is only for wanton and reckless conduct to the plaintiff's injury. *McKeon v. New York, New Haven, & Hartford Railroad*, 188 Mass. 271. *Palmer v. Gordon*, 178 Mass. 410. *Lovett v. Salem & South Danvers Railroad*, 9 Allen, 557, 563. In this latter class of cases, where the negligence is wanton and reckless to such a degree as to be in its nature a wilful wrong, it is held that, although the plaintiff makes an averment of due care on his part, this means only due care in reference to the direct and proximate cause of the injury, and, such a gross wrong of the defendant being shown to be the cause, it *prima facie* so far excludes participation in it by the plaintiff, as to relieve him from the necessity of offering affirmative evidence of his care. *Aiken v. Holyoke Street Railway*, 184 Mass. 269. *Bjornquist v. Boston & Albany Railroad*, 185 Mass. 180. *Banks v. Braman*, 188 Mass. 367. The fundamental principle is the same in both classes of cases. It is that the plaintiff's condition, resulting from his previous negligence or wrong, is not a direct and proximate cause of the later injury, inflicted by one who acts independently, with knowledge of this condition and in reference to it. The principle has been generally recognized, both in England and America. *Davies v. Mann*, 10 M. & W. 546. *Radley v. London & Northwestern Railway*, 1 App. Cas. 754. *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551. *Memphis & Charleston Railroad v. Martin*, 131 Ala. 269. *Green v. Los Angeles Terminal Railway*, 143 Cal. 31, 41. *Isbell v. New York & New Haven Railroad*, 27 Conn. 393. *Indianapolis & Cincinnati Railroad v. Wright*, 22 Ind. 376. *Keefe v. Chicago & Northwestern Railway*, 92 Iowa, 182. *Atwood v. Bangor, Orono & Old Town Railway*, 91 Maine, 399. *Baltimore & Ohio Railroad v. State*, 33 Md. 542. *Buxton v. Ainsworth*, 188 Mich. 532. *Rawitzer v. St. Paul City Railway*, 98 Minn. 84. *State v. Manchester & Lawrence Railroad*, 52 N. H. 528. *Railroad Co. v. Kassen*, 49 Ohio St. 230. *Wiley v. Boston & Maine Railroad*, 72 Vt. 120. *Richmond Traction Co. v. Martin*, 102 Va. 209. *Bostwick v. Minneapolis & Pacific Railway*, 2 No. Dak. 440.

The rule has often been applied in favor of plaintiffs whose intoxication prevented them from using care to protect them-

selves from the consequences of a subsequent act of negligence of another person, done with knowledge of their intoxication. *Wheeler v. Grand Trunk Railway*, 70 N. H. 607. *Kean v. Baltimore & Ohio Railroad*, 61 Md. 154. *Fox v. Michigan Central Railroad*, 138 Mich. 483. *Cincinnati, Indianapolis, St. Louis & Chicago Railroad v. Cooper*, 120 Ind. 469.

The question that we have been discussing was not considered in *Holland v. West End Street Railway*, 155 Mass. 387. It does not appear that there was evidence of negligence on the part of the defendant in that case, or that anything was done in reference to the plaintiff with knowledge of his intoxication.

*Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, is not at variance with this rule. In that case it was held by a majority of the court that the rule applicable to an action brought by one injured by a wanton and reckless act of negligence of another, which permits him to recover without affirmative evidence to sustain his averment that he was in the exercise of due care, is inapplicable to an action for death caused by such an act, brought under the St. 1886, c. 140. The decision rests upon the construction of the words "due diligence" used in that statute.

We are of opinion that the jury in the present case might have found that the plaintiff was free from any negligence that was a direct and proximate cause of the injury.

*Exceptions sustained.*

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**SAMUEL BROMLEY vs. NEW YORK, NEW HAVEN, AND  
HARTFORD RAILROAD COMPANY.**

Middlesex. November 16, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Railroad. Evidence.*

If a passenger in a combination car on a train of a railroad company leaves the passenger compartment, where there are vacant seats, and goes into the baggage compartment to see a box of fowl and to talk with the baggage master about fowl, and if, while he is standing there with his hand on the side of the car, the train comes in collision with a part of a freight train on the same track, and the



passenger is thrown over a low box of fowl, striking his shin on the box before falling, and is injured by striking his head and side on the floor of the car, he cannot recover from the railroad company for his injuries, which in part were due to his having left the place assigned for passengers and occupying an exposed position.

If a passenger in a train of a railroad company was injured in a collision which occurred when he unnecessarily had left his seat in the passenger compartment of a combination car and was standing in the baggage compartment with his hand on the side of the car, the fact that the conductor punched his ticket while he was in the baggage compartment does not give him a right to recover from the railroad company, if his injuries were due in part to his exposed position.

In an action against a railroad company for personal injuries by a passenger, who was injured in a collision which occurred when he unnecessarily had left his seat in the passenger compartment of a combination car and was standing in the baggage compartment with his hand against the side of the car, and whose injuries were due in part to his exposed position, it is right for the presiding judge to exclude evidence offered by the plaintiff to show that it was customary for passengers passing between the towns between which the plaintiff was travelling to travel in the baggage compartment of the car and to have their tickets punched and taken by the conductor when there.

TORT for personal injuries received by the plaintiff from a collision of trains on the defendant's railroad near Southborough on January 23, 1904, when the plaintiff was a passenger on the defendant's train from South Framingham to Marlborough. Writ dated February 19, 1904.

At the trial in the Superior Court *Hitchcock*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*J. J. Shaughnessy*, for the plaintiff.

*J. L. Hall*, for the defendant, was not called upon.

LORING, J. The plaintiff was a passenger on the defendant's railroad. He left the passenger compartment of the combination car and went into the baggage compartment, for the purpose of talking with the baggage master about fowl and to see a box of fowl which was in that part of the car. When the plaintiff left the passenger compartment about half of the seats in it were empty. He was injured by the train coming into collision with a part of a freight train which had been left on the same track. The train was going about fifteen miles an hour at the time of the collision, and the plaintiff then was standing with his hand on the side of the car, talking with the baggage master. He was thrown over a low box of fowl that was near him, and struck his head and side on the floor. "His shin struck the box before he had fallen."

This case comes within the class of cases beginning with *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429, and ending with *Fletcher v. Boston & Maine Railroad*, 187 Mass. 463, in which it is held that one who has left the place assigned for passengers and is occupying an exposed position cannot recover when the injury is due in part to the fact of such position.

The plaintiff's first contention is that his position in the baggage car did not contribute to the injury he received. The statement of the injury in our opinion shows that it did.

His next contention is that the defendant acquiesced in his being where he was because the conductor punched his ticket while he was in the baggage car. That contention is disposed of in *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429.

The same case establishes the point that the presiding judge here was right in excluding "evidence to show that it was customary for passengers between South Framingham and Marlboro to ride in the baggage compartment of the car, and to have their tickets punched and taken by the conductor when there." *Wilde v. Lynn & Boston Railroad*, 163 Mass. 533, and *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574, relied on by the plaintiff, were cases of passengers riding on platforms of electric cars when all the seats were taken. They stand on a different footing. We find nothing in the other Massachusetts cases cited by him which supports his contention.

*Exceptions overruled.*

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AMERICAN WOOD WORKING MACHINERY COMPANY vs.  
WILBUR P. FURBUSH.

Suffolk. November 16, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Bankruptcy. Practice, Civil, Entry of judgment, Default, Continuance. Words, "Ripe for judgment."*

The provisions of the bankruptcy act of 1898, c. 541, § 11, in regard to the staying of pending suits against a bankrupt founded on claims to which a discharge would be a release, require the court to grant a continuance in cases within the

terms of the act, unlike the corresponding provisions of the insolvency act which leave the granting of a continuance to the discretion of the court.

When the last entries in the record of an action are a suggestion by the defendant of his bankruptcy and a motion for a continuance founded thereon, under the bankruptcy act of 1898 the case is not ripe for judgment until the motion is passed upon by the court.

The fact that a defendant has been defaulted does not deprive him of the right to file a motion for a continuance based on a suggestion of his bankruptcy and to have such motion heard.

CONTRACT upon a promissory note. Writ in the Municipal Court of the City of Boston dated May 18, 1905.

On appeal to the Superior Court the defendant was defaulted, and, after the proceedings and motions which are stated in the opinion, *Gaskill, J.* refused to make certain rulings and ordered that the case be continued as there stated. The plaintiff alleged exceptions.

*H. Dunham*, for the plaintiff.

*D. D. Corcoran*, for the defendant, submitted a brief.

KNOWLTON, C. J. On October 12, 1905, the defendant was defaulted, and the next day all papers necessary to make up the judgment were filed in the case. On November 2 the defendant filed a motion for continuance on the ground of his bankruptcy; on Monday, November 6, at half past ten o'clock in the forenoon, this motion was granted by the court. On the same day, at what hour in the day the bill of exceptions does not show, a judgment for the plaintiff was entered by the clerk, under the standing order of the court. Subsequently the plaintiff's counsel filed a motion to dismiss the motion for continuance which had been allowed, and, upon hearing, the motion to dismiss was disallowed, and the motion to continue was allowed as of November 2, 1905, that being the intention of the court by the order of November 6. The plaintiff excepted to the refusal of the court to rule that it "had no jurisdiction to grant a continuance of said action" and that the defendant had "no standing in court to make a motion for continuance."

If judgment was wrongly rendered under the general order because the case was not ripe for judgment, the motion for a continuance was rightly granted, and it is unnecessary to consider whether the order of the court might not be sustained on other grounds.

The United States bankruptcy act of 1898, c. 541, § 11, is as follows: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Unlike our statutes in regard to insolvency, this act does not leave the continuance of a case upon the application of the bankrupt defendant therefor to the discretion of the court, but it requires the court to grant the continuance. In this respect the case differs from *Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 15, relied on by the plaintiff. See *Sullings v. Ginn*, 131 Mass. 479. It also differs from that case in another important particular. Something had intervened between the default and the entry of judgment under the general order, namely, the suggestion of bankruptcy and the motion for a continuance founded upon it. As was said in that case, under such circumstances it may well be said that a case is not ripe for judgment. See also *Norcross v. Crabtree*, 161 Mass. 55; *Gilchrist v. Cowley*, 181 Mass. 290. There has been some difference in the statements as to when a case is ripe for judgment, within the meaning of the rule of the Superior Court. See, besides the above cases, *Hosmer v. Hoitt*, 161 Mass. 173; *Somerville v. Fiske*, 137 Mass. 91; *Dunbar v. Baker*, 104 Mass. 211. It may be difficult to give a definition of the term "ripe for judgment," applicable to all cases; but in general we may say that it is when, under the last entry, the case seems to have been brought to a final determination, and everything seems to have been done that ought to be done before the entry of a final adjudication upon the rights of the parties. When the last entry is a suggestion by the defendant of his bankruptcy, and a motion for a continuance founded on this fact, it is evident, under the present bankruptcy act, that judgment should not be entered until the motion is passed upon by the court. We do not think that the fact that a defendant is under a default deprives him of the right to file such a motion and have it heard. The filing of the

motion itself is, in substance, a motion to take off the default, so far as to enable the defendant to be heard on the question whether the case shall go to judgment or be continued to enable him to obtain and plead a discharge. The present case was not ripe for judgment at the time of the entry under the general order.

*Exceptions overruled.*

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THOMAS B. RICE vs. CHARLES L. JAMES & another.

Suffolk. November 16, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Agency. Evidence, Opinion, Hearsay. Practice, Civil, Exceptions.*

In an action for the price of lumber sold and delivered, where the question is whether the lumber was bought from the plaintiff for the defendant by a certain lumber broker while acting as the authorized agent of the defendant, a witness for the plaintiff should not be permitted to testify that the broker alleged to have bought the lumber was at that time the authorized agent of the defendant for the purchase and sale of goods for his account, this being a statement of the opinion of the witness.

The exclusion of an answer of a witness is no ground for exception if it does not tend to show the facts sought to be established by it, or if such facts have been admitted by the other side.

In an action for the price of goods sold and delivered, where the plaintiff seeks to show the liability of the defendant by proving a sale to a broker alleged to have been the agent of the defendant, if the broker is not a party or a witness in the case, a letter written by him to an outside person offered in evidence by the plaintiff should be excluded as mere hearsay.

In an action for the price of goods sold and delivered, where the plaintiff seeks to show the liability of the defendant by proving a sale to a broker alleged to have been the defendant's agent, if there is evidence that in all the transactions with the plaintiff in which the broker represented the defendant he was given special authority for each transaction and never acted under a general authority, it is proper for the presiding judge to refuse a request of the plaintiff for an instruction as to the effect of previous purchases, as a ground for inferring authority to make like purchases afterwards, which recognizes no difference between purchases made under a special authority for each occasion and purchases made as a general agent.

Where at a trial an undisputed fact, asserted by one side and testified to by the other, repeatedly was referred to by the presiding judge in his charge as a fact that the jury might find, his refusal to state this fact in terms to the jury, which

would have given his charge the effect of an argument, is no ground for exception.

In an action for the price of goods sold and delivered, where the plaintiff seeks to show the liability of the defendant by proving a sale to a broker alleged to have been his agent, if it appears that the broker at a previous time was employed by the defendant as his local agent, it is right for the presiding judge to instruct the jury not to consider the former use by the broker of letter heads bearing the defendant's name on which the broker was designated as the defendant's local agent.

In an action for the price of goods sold and delivered, where the plaintiff sought to show the liability of the defendant by proving a sale to a broker alleged to have been his agent, there was evidence that in all the previous transactions with the plaintiff in which the broker represented the defendant he was given special authority for each transaction and never acted under a general authority, but there was no evidence that before the transactions in question the defendant ever notified the plaintiff of any limitation of the agent's authority. The plaintiff asked for an instruction in regard to the agent's ostensible authority. The judge refused to give the particular instruction requested, and in his charge to the jury, after referring to a single transaction as generally insufficient to warrant a finding that there was authority to act in other later transactions, added "but sometimes the conduct, where it covers a long period of time, or a variety of transactions, will render a person liable for the acts of a person as his agent when it was not his intention to constitute the person as his agent." The substance of the charge was that, if persons were allowed to deal with an agent on his own representations that he had authority to act for his principal, and the principal recognized the dealings as valid and gave no notice of any change in the conditions, he might be bound by subsequent transactions of a similar kind, even though they were unauthorized or expressly forbidden. *Held*, that the plaintiff had no ground for exception.

CONTRACT for a balance of \$370.96 and interest, for lumber sold and delivered by the plaintiff to the defendants. Writ in the Municipal Court of the City of Boston dated August 30, 1900.

On appeal to the Superior Court the case was tried before *Bond, J.* The declaration was upon an account annexed and covered fifty-five items, showing charges of \$1,726.67 and credits of \$1,355.71, leaving the balance claimed to be due as stated above. The charges covered the period from August 13, 1897, to April 23, 1898, inclusive. The plaintiff was a wholesale and retail dealer in lumber and a manufacturer of boxes and box shooks, with his mills and offices in the city of Philadelphia. The defendants were wholesale and retail lumber dealers, with their usual place of business in Boston. After the bringing of this action the defendants tendered payment for items amounting to \$107.97 included in the account annexed, and at the trial they

admitted liability for those items. This left as the only matter in dispute items nine to nineteen inclusive, all embraced in one transaction of March 12 and 14, 1898, amounting to \$262.99. The defendants had no direct dealings with the plaintiff, but all of the items charged in the account, for which payment was made or tendered, had been purchased in Philadelphia by one J. Stewart Knight, who, the plaintiff alleged, was the regular and duly authorized agent of the defendants. The defendants disputed the charges of March 12 and 14, 1898, and asserted that Knight was not authorized to buy this particular lot of lumber in their behalf, and did not, as a matter of fact, make the purchase, but only inquired the price. The evidence for the plaintiff was entirely by depositions, except that Charles L. James, one of the defendants, was called to the stand by the plaintiff and examined, and produced copies of all the correspondence between the plaintiff and the defendants relating to the account, together with two letters from Knight to the defendants.

At the close of the evidence the plaintiff asked the judge to give the following instructions :

"1. If J. Stewart Knight claimed to the plaintiff to be the agent of the defendants, and bought goods in their behalf from the plaintiff prior to March 12, 1898, for which goods the defendants have made or tendered payment to the plaintiff, then it makes no difference what limits the defendants may have placed upon J. Stewart Knight's authority to buy in their behalf unless they notified the plaintiff of those limitations prior to the sale of March 12, 1898.

"2. If the plaintiff was justified in believing J. Stewart Knight to be the agent of the defendants and authorized to buy goods in their behalf on March 12, 1898, then you will find for the plaintiff in the sum of \$370.96 with interest at the rate of six per cent. from August 31, 1898.

"3. There is no evidence that the defendants ever notified the plaintiff prior to March 12, 1898, of any limitation of J. Stewart Knight's authority to purchase lumber from the plaintiff in their behalf."

The judge refused to give any of these instructions. The jury found for the plaintiff in the sum of \$131.84; and the plaintiff

alleged exceptions relating to the exclusion of certain evidence offered by him, to the refusal of the foregoing instructions and to a portion of the judge's charge. The questions raised by the exceptions are described in the opinion.

*F. M. Forbush & H. Tirrell*, for the plaintiff.

*W. R. Sears*, for the defendants.

KNOWLTON, C. J. The exceptions first argued by the plaintiff relate to the exclusion of evidence. To prove his case the plaintiff called one of the defendants, and, besides letters and papers, he introduced the depositions of three other witnesses, two of whom were clerks in his office and the other a yard foreman. This was all the evidence in the case. Three of these witnesses testified as fully as the plaintiff desired. Certain questions and answers in the deposition of the other were excluded. These, so far as material, were all offered to show the authority of one Knight to bind the defendants by a purchase of the lumber charged in the disputed items. The testimony on the subject of his authority is that, several years before the transactions in question, he was the manager and agent, in Philadelphia, for the defendants, who were lumber merchants in Boston, although the plaintiff never dealt with him in that capacity, and that this relation to the defendants had terminated long before the purchases for which this action was brought. At the time of these purchases he was a lumber broker and commission merchant, acting for different persons, and sometimes buying lumber on his own account. A witness testified that, in all the transactions with the plaintiff in which, at different times, Knight represented the defendants, he was given special authority in each case, and never acted under a general authority. All this testimony was uncontradicted. It appeared that, at different times from August 13, 1897, to April 23, 1898, the defendants bought lumber of the plaintiff through him, which was charged in thirty-eight items, although often a single transaction was represented by several items. All of these items were undisputed. The only controversy was in regard to eleven items, charged on March 12 and March 14, and representing only one transaction. The question was whether Knight bought the lumber charged in these eleven items, and if so, whether he was acting for the defendants, under their authority. The first excluded



testimony to which the exceptions relate was an answer of the witness, as follows: "He was at that time the recognized, authorized agent of James and Abbott, of Boston, the defendants in this case, for the purchase and sale of goods for their account," and several other similar answers. The plaintiff was permitted to show any facts that would tend to establish Knight's agency. This answer was simply the opinion and conclusion of the witness, from facts that he had observed, and was plainly incompetent. All the answers containing a statement of this kind were rightly excluded.

The sixteenth interrogatory was, "Had you previous to this date received messages by telephone from J. Stewart Knight, ordering lumber for James and Abbott of Boston? If so, give particulars." The witness answered: "I had many conversations previous to this date over the telephone with J. Stewart Knight in relation to prices and orders for lumber but it is impossible for me to remember particulars at this time." The fact that he had many conversations with a lumber broker about this time, in reference to prices and orders, without more, was wholly immaterial. This answer does not show that the witness remembered whether any orders were given for the defendants, or whom Knight professed to represent, or whether he represented anybody but himself in making these inquiries. Besides this, the witnesses testified that "every item on the list [meaning the forty-nine items] was ordered by J. Stewart Knight for account of James and Abbott and was so treated in the books of Thomas B. Rice."

The excluded answer to the seventeenth interrogatory was not strictly responsive, as the question referred in terms to a single order, while the answer was given in the plural.\* Besides, this answer was covered by the testimony just quoted, and the facts referred to in it were admitted by the defendants and their counsel at the trial. There was no error in the exclusion of any part of the testimony.

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\* The interrogatory and answer were as follows:

"Int. 17. Was said order filled and goods so ordered shipped on account of James and Abbott and did they pay for the same?" "A. Previous orders received from J. Stewart Knight were shipped as on account of James and Abbott who paid the bill."

The letter of Knight, written to the lumber exchange of Philadelphia, was rightly excluded. Knight was not a party or a witness in the case, and the letter was mere hearsay.

The first instruction requested was rightly refused. It recognized no difference as to the effect of purchases made at different times under a special authority for each time, and purchases made as a general agent, in reference to inferring authority to make like purchases afterwards.

The judge was not bound to tell the jury in terms that there was "no evidence that the defendants ever notified the plaintiff prior to March 12, 1898, of any limitation of J. Stewart Knight's authority to purchase lumber from the plaintiff in their behalf." This was an undisputed fact in the case, affirmed by the plaintiff and testified to by one of the defendants, and the judge referred to it repeatedly in his charge as a fact that the jury might find. He was not obliged to state this particular part of the testimony for the purpose of giving his charge the effect of an argument.

The judge rightly told the jury that they were not to consider the former use of the letter heads by Knight when he was employed as the defendants' local agent.\*

The last exception is to the instruction in regard to ostensible authority. The statements in this part of the charge are not so clear as they are in the rest of it, but we have no doubt that the judge's view of the law, and his statement of it as he intended the statement to be understood, were correct. After referring to a single transaction as generally insufficient to warrant a finding that there was authority in other later transactions, he added, "but sometimes the conduct, where it covers a long period of time, or a variety of transactions, will render a person liable for the acts of a person as his agent when it was not his intention to constitute the person as his agent." Then follows the statement to which exception is taken. We think the meaning of the language objected to is not that there was necessarily to be any formal arrangement between the principal and his agent that he should make particular representations as to his authority; but merely a general understanding by the principal

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\* These letter heads bore the firm name of the defendants with the address of their Philadelphia office and designated Knight as "Manager for New York, Pennsylvania and New Jersey."

that people might deal with the agent upon his own representations of his authority, without anything from his principal. The substance of the charge was that, if people were allowed to deal with an agent in such a way, and the principal recognized these dealings as valid, and gave no notice of any change in the conditions, he might be bound by subsequent transactions of a similar kind, even though they were unauthorized or expressly forbidden. No particular objection to this part of the charge was pointed out, and no request for other instructions was made. We are of opinion that the jury were not misled, and this exception must be overruled.

*Exceptions overruled.*

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### COMMONWEALTH vs. ELIZABETH E. HARTFORD.

Suffolk. November 19, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Pleading, Criminal, Indictment. Evidence, Competency, Admissions by conduct.*

An indictment under R. L. c. 212, § 16, as amended by St. 1905, c. 316, charging the defendant with knowingly distributing and circulating a printed paper conveying notice of a place where directions, information and knowledge might be obtained for the purpose of causing and procuring the miscarriage of women pregnant with child, is sufficient under R. L. c. 218, §§ 17 and 29, if the crime is set forth in the words used in the statutes with a general averment that the defendant committed the act, and no further averment of a guilty knowledge of the contents of the paper is necessary.

At the trial of an indictment under R. L. c. 212, § 16, as amended by St. 1905, c. 316, for knowingly distributing and circulating a card conveying notice of a place where directions and information might be obtained for the purpose of causing or procuring the miscarriage of women pregnant with child, where it appears that the card described in the indictment was given by the defendant to a police officer in disguise in response to an inquiry by him as to treatment for a proposed patient, evidence is admissible describing the rooms where the inquiry was made and the card was given, of the presence there of envelopes addressed to physicians containing similar cards, and of statements made by the defendant to a sergeant of police who entered while the interview was in progress, that the officer to whom she had given the card was a friend of hers, giving a name and address as his, and that she got acquainted with him at a social party two months previous.

At the trial of an indictment under R. L. c. 212, § 16, as amended by St. 1905, c. 316, for knowingly distributing and circulating a card conveying notice of a

place where directions and information might be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child, where it appears that the card described in the indictment was given by the defendant to a witness for the Commonwealth, who was a police officer in disguise, in response to an inquiry by him as to treatment for a proposed patient, the evidence of the delivery of the card is none the less admissible because it was procured by lying and deceit on the part of the witness, and it is a question for the jury whether the card was delivered voluntarily with a criminal purpose.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk on June 9, 1906, charging that the defendant on May 9, 1906, at Boston, "did knowingly distribute and circulate a certain printed paper, notice, advertisement and reference then and there containing words and language giving and conveying notice, hint and reference to a certain place where advice, directions, information and knowledge might be obtained for the purpose of causing and procuring the miscarriage of women pregnant with child, which said printed paper, notice, advertisement and reference is of the tenor following, that is to say:" Here followed a copy of the printed paper referred to, which was a card put in evidence at the trial.

In the Superior Court the case was tried before *DeCourcy, J.* Before the empanelling of the jury, and before the trial of the case, the defendant filed and made two motions to quash the indictment, each of which was denied by the judge; and the defendant appealed.

At the trial the Commonwealth called as a witness one Mitchell, who testified that he was a police officer of the city of Boston, and that on May 9, 1906, in consequence of information and instructions received from his superior officer, he went to a room in a building on Tremont Street, in Boston, where he found the defendant seated at a desk, between two and three o'clock in the afternoon, and had a conversation with her. Against the objection and subject to the exception of the defendant, this witness was allowed to state the conversation, it appearing from his testimony that it was at the time and place of this conversation that the card above mentioned was given by the defendant to the witness. A part of this conversation was as follows:

"I asked if the doctor was in, and she said, 'No.' She says, 'What do you want?' I said, 'I want to see the doctor.' She says, 'What do you want to see him for?' I says, 'I don't

think I ought to tell you ; it is about a female trouble.' ' Well,' she says, ' that is what I am here for.' So she came over to the desk and sat down, and I sat down in the chair along side of her, and she asked me what it was, and I told her. I says, ' I know a girl that is in trouble.' I says, ' I understand this is a place to have those things taken care of.' She says, ' How far along is the girl?' I says, ' Three months.' She says, ' That is a pretty delicate period for an operation.' She says, ' We have the best nurses at our hospital.' And she said, ' If we take this case we will guarantee satisfaction.' She says, ' It will cost you \$100.' Then she asked if the girl was a healthy girl. I said, ' Yes.' She says, ' Where does she live?' I says, ' In Chelsea.' She says, ' You bring her here and I will take her to the hospital.' She says, ' First, I will have to find out whether we have room in the regular hospital, and if we haven't we take them sometimes to a private hospital.' I says, ' Where is that hospital?' She says, ' It is up town, about twenty minutes' ride from the Boylston Street subway, on the electric cars.' Then I asked her if she had any cards, and she opened a drawer at the desk and she took out this card, and I saw several other cards of the same kind in there at the time. She passed me that one. She says, ' Now we are very careful whom we give those cards to.' ' Because,' she says, ' you know there used to be some places like this in this building before, and if the inspectors knew it they would raid us.' She told me that they did intend to have a front room, but on account of the previous raids there they thought a back room would be better. She asked me then to have the girl at the office, or at the Boylston Street subway at one o'clock on the following day, and she would take her to the hospital."

The witness also testified to another conversation with the defendant on the next day at the same place. He testified that there were on the desk some envelopes addressed to physicians ; and that the defendant said there were cards in these envelopes and that the only people she sent those cards to were physicians.

Against the objection and subject to the exception of the defendant the card which the defendant gave to the witness was introduced in evidence by the government.

The witness also testified that after further conversation with

the defendant, a sergeant of police came in with a squad of police officers. He then testified, "The sergeant asked her who I was, and she said I was a friend of hers. He asked her what my name was, and she said my name was Sidney Cole. He asked her where I lived, and she said that I lived out in Newton. He asked her where she got acquainted with me, and she told him at a social party, about two months previous. He asked her then what the envelopes were on the desk, and she said they were directed to doctors. He opened some of them while I was there, but he stood back to me and I couldn't tell what he took out of them."

On cross-examination the witness admitted that the essential parts of the statements and representations made by him in the conversations were untrue and were made for the purpose of getting information in regard to the business that was carried on in the place, and that he wanted to find out what the place was for, and did not care how many statements "he made which were untrue."

Asked in cross-examination with reference to the card above referred to, he testified as follows: "Q. That is the only card you got? A. That is the only one I got from her. — Q. And that is the only card that you saw her deliver to anybody? A. That is the only card that I saw her deliver. — Q. And you asked her for it? A. Yes, sir. — Q. And before you asked her for it you told her the condition of this alleged friend of yours? A. Yes, sir. — Q. And the statements you made up to the time you got the card you know weren't founded on facts, isn't that true? A. Yes. There was no facts. — Q. And you made this statement for the purpose of getting possession of the card, isn't that right? A. I told the story for to get what information I could. — Q. And to get possession of the card? A. Anything, yes, anything that would be evidence."

At the close of the witness's testimony the defendant requested that the evidence of the card be stricken out and withdrawn from the consideration of the jury. The judge refused the request.

The sergeant of police, called as a witness by the Commonwealth, testified to some of the same facts, and, against the objection and exception of the defendant, was allowed to de-

scribe the room and its contents, and to testify to what articles he found in searching the premises with a search warrant. A police officer, who accompanied the sergeant, testified in regard to a number of envelopes addressed to physicians containing cards similar to the one delivered to the witness Mitchell, which he found in searching the desk.

At the close of the evidence the defendant asked for certain rulings which were refused by the judge, but these have become immaterial, because the exceptions to their refusal were not argued and therefore were treated by the court as waived.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*H. W. James*, for the defendant.

*M. J. Dwyer*, Assistant District Attorney, for the Commonwealth.

**BRALEY, J.** Because guilty knowledge of its contents is not specifically averred, and only the general allegation appears that she "knowingly" distributed a circular or advertisement, the defendant's first contention is that no criminal offence has been described, and the motions to quash should have been granted. *Commonwealth v. Boynton*, 12 Cush. 499. Compare *Rosen v. United States*, 161 U. S. 29; *Price v. United States*, 165 U. S. 311. But the indictment follows the language of R. L. c. 212, § 16, as amended by the St. of 1905, c. 316, as to the first of the offences created and defined, and under R. L. c. 218, §§ 17 and 29, the crime charged may be set forth in the words used in the statute, with a general averment that the defendant committed the act, which obviates any further technical description of an evil intent. *Commonwealth v. Hersey*, 2 Allen, 173, 180. *Commonwealth v. Lavery*, 188 Mass. 13, 16. If there was any uncertainty as to the particulars of the offence further information would have been furnished upon the defendant's motion if otherwise the charge had not been plainly and substantially stated. R. L. c. 218, § 39. *Commonwealth v. Kelley*, 184 Mass. 320. *Commonwealth v. McDonald*, 187 Mass. 581. This course was not taken, and the indictment being sufficient the motions were properly denied.

The defendant's further contention is that in substance the entire testimony introduced by the Commonwealth was incom-

petent. While the acts made criminally punishable are distinct from the crime of procuring an abortion, evidence describing the rooms with their furnishings, the envelopes addressed to physicians containing similar cards, and the defendant's statements relating to the origin of her acquaintance with the officer to whom she had given the card described in the indictment, was properly admitted, not only as being descriptive either of the defendant's place of business, or of her employment, but also as indicative of her guilty knowledge of the contents of the card. *Commonwealth v. Devaney*, 182 Mass. 33, 36. *Commonwealth v. Bond*, 188 Mass. 91, 93, 94. It is true that mere possession of this card was not a crime, for the offence charged is its distribution or circulation as a paper conveying information where operations were performed for the purpose of procuring the miscarriage of pregnant women, but if intentionally handed to a patient who was seeking such treatment the offence would have been complete, and this equally would be true if the receiver was inquiring as to similar aid in behalf of a proposed patient. The weight of the defendant's argument, therefore, is that because it was procured by false representations there was no proof either of distribution or of circulation. Generally solicitation to commit a crime to which the party solicited yields, does not exonerate the wrongdoer, or exempt him from prosecution, and under the statute it is the circulation or distribution with guilty knowledge which is made unlawful, although patients may not be obtained. The intention with which it is put out is the controlling element, and if the defendant issued the card as an advertisement containing the information sought this would be a violation of the statute. If from a desire to obtain patronage she chose to rely upon the officer's statements rather than to require any corroboration before acting upon them such conduct would neither lessen her criminal responsibility, nor render his testimony incompetent if the jury were satisfied that it was delivered voluntarily with a criminal purpose, which was clearly and accurately explained in the instructions given. *Commonwealth v. Dana*, 2 Met. 329. *Commonwealth v. Coleman*, 157 Mass. 460, 461. *Commonwealth v. Tibbets*, 157 Mass. 519. *Commonwealth v. Tucker*, 189 Mass. 457, 468. *Foster's Crown Cases*, 129. *Regina v. Williams*, 1 C. & K. 195.



The requests for rulings not having been argued must be treated as waived, and no error of law appearing the order denying the motions to quash must be affirmed and the exceptions overruled.

*So ordered.*

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AMERICAN UNITARIAN ASSOCIATION vs. COMMONWEALTH.

Suffolk. November 19, 20, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Constitutional Law. Statute. Estoppel.*

A petitioner for damages on account of the limitation of the height of buildings on Bowdoin Street in Boston, under the provision of St. 1902, c. 543, § 2, giving damages to any person owning land on specified parts of certain streets "whose property is damaged more than it is benefited by the improvement of the State House, consisting of the limitation of the height of buildings on said land, the laying out and grading of said streets, the removal of buildings between Hancock Street and Bowdoin Street, the reconstruction and extension of the State House and the construction of the park between Bowdoin Street and the State House," is estopped from maintaining that the part of the statute requiring the deduction of the benefit received from previous improvements made under different statutes is unconstitutional; as the petitioner has no standing in court except by the terms of the part of the statute requiring such deduction; and also because the different parts of the statute are not separable and the court cannot say that the Legislature would have imposed the limitation on the height of buildings unless they had assumed that they could treat the changes made under different statutes as one general improvement and could make the restriction upon buildings a part of the improvement. *Whether it would be held, in case any one had the right to raise the question, that the Legislature thus could limit the compensation for a right of property taken to its value diminished by the value of the benefit received by the remaining estate from the general improvement, was declared to be a grave question which the court did not find it necessary to decide.*

PETITION, filed November 11, 1902, under St. 1902, c. 543, § 2, alleging that the petitioner was on June 15, 1900, and at the time of the filing of the petition the owner of a tract of land with the buildings thereon at the corner of Beacon Street and Bowdoin Street in Boston known as number 25 Beacon Street, that this property is damaged by the laying out and grading of Bowdoin Street and the limitation of the height of buildings on the land "more than it is benefited by the improvement of the

State House, consisting of the limitation of the height of buildings on said land, the laying out and grading of said streets, the removal of buildings between Hancock Street and Bowdoin Street, the reconstruction and extension of the State House and the construction of the park between Bowdoin Street and the State House," and praying that the damages which it has sustained may be assessed by a jury of the Superior Court as provided in the acts referred to in the petition.

In the Superior Court the case was referred to Patrick H. Cooney, Esquire, as auditor. After the filing of his report, the case was heard by *Richardson, J.*, without a jury. The petitioner put in evidence the auditor's report, and the respondent offered no evidence. An agreed statement of additional facts was filed by the parties. The judge found the facts, and the damages in the several alternatives, to be as set forth in the auditor's report and the agreed facts, and ruled *pro forma* that the petitioner was entitled to judgment in the sum of \$11,570.46 with interest thereon from January 1, 1902, subject to the opinion of this court upon the questions raised in paragraphs 8, 9 and 10 of the auditor's report.

At the request of the parties, he reported the case for determination by this court upon the auditor's report, the agreed facts and exhibits, and the judge's finding of the facts and *pro forma* ruling on the law, such judgment to be entered as law and justice might require for such one of the sums stated in the alternatives found in the auditor's report as this court might determine that the petitioner was entitled to recover.

The paragraphs of the auditor's report mentioned in the report of the judge were as follows:

"8. At the trial the petitioner contended and requested the auditor to find and rule:

"I. That the only benefit to be considered in estimating the excess of damage over benefit is that arising from the change of grade and widening of Bowdoin Street and from the limitation of the height of buildings on other property under St. 1902, c. 543, § 1, on the ground that such benefit alone is in law special and peculiar to the petitioner's estate.

"The auditor declined to so find or rule, and found and ruled otherwise.

"If, however, the court shall be of opinion that the petitioner's contention is correct in law and that the ruling requested should have been made either in form or substance, then the auditor finds that the petitioner's said property was damaged more than it was benefited by the improvements in the additional sum of \$12,000, and in that event the auditor finds and reports that the petitioner is entitled to recover the sum of \$23,575.46 with interest thereon since January 1, 1902, instead of \$11,570.46 as first stated.

"9. The petitioner further contended and requested the auditor to find and rule:

"II. That, in estimating the excess of damage over benefit, the auditor is to consider only the benefit accruing under Sta. 1901, c. 525, and 1902, c. 543, which caused the damage, — that is, that he is under St. 1902, c. 543, § 2, to consider only the benefit from the limitation of the height of buildings on other estates by § 1, the laying out and grading of said streets, especially Bowdoin Street, under St. 1901, c. 525, § 1, as amended by St. 1902, c. 543, § 3, the removal of the buildings between Mount Vernon and Bowdoin Streets and the construction of the park between Bowdoin Street and the State House so far as it lies between Beacon Street and Beacon Hill Place under St. 1900, c. 382, §§ 1, 2, as amended by St. 1901, c. 525, § 1, and St. 1902, c. 543, § 3, and is not to consider the benefit from the removal of buildings between Hancock and Bowdoin Streets under Sts. 1888, c. 349, and 1892, c. 404, the reconstruction and extension of the State House under Sts. 1888, c. 349, and 1889, c. 394, and the construction of the park between Bowdoin Street and the State House so far as it lies between Beacon Hill Place and Derne Street under Sts. 1892, c. 404, and 1893, cc. 129, 450.

"The auditor declined to so find or rule, and found and ruled otherwise.

"But if the court shall be of the opinion that the first ruling requested was rightly refused and that the petitioner's second contention is correct in law and that the second ruling requested should have been made either in form or substance, then the auditor finds that the petitioner's said property was damaged more than it was benefited by the improvements to be considered in the additional sum of \$6,000; and, in that event, the

auditor finds and reports that the petitioner is entitled to recover the sum of \$17,570.46 with interest thereon since January 1, 1902, instead of either of the other sums hereinbefore stated.

"10. The petitioner also requested the auditor to rule:

"III. That, if the benefit accruing to its said property from all the improvements mentioned in St. 1902, c. 543, § 2, as a whole is to be considered in estimating the excess of damage over benefit, interest is to be added to said excess from the date of the beginning of said improvements by the extension of the State House under St. 1888, c. 349, § 1, and that the petitioner is therefore entitled to recover the sum of \$11,570.46 with interest thereon from November 15, 1888, the date of the taking under said act.

"The auditor declined so to rule and ruled that the petitioner was entitled to interest only from January 1, 1902, as above found and reported."

The agreed facts were as follows:

1. The land from Hancock to Temple Street was taken on November 15, 1888, under St. 1888, c. 349, § 1, entry made thereon immediately thereafter to remove the buildings, and the State House reconstruction and extension thereon was built between 1888 and 1894.

2. The land from Temple Street to Bowdoin Street north of Beacon Hill Place to Derne Street was taken on June 16, 1892, under the act of 1892, c. 404, and the buildings thereon were removed and the park laid out under said act and the act of 1893, c. 129, between those dates and 1895.

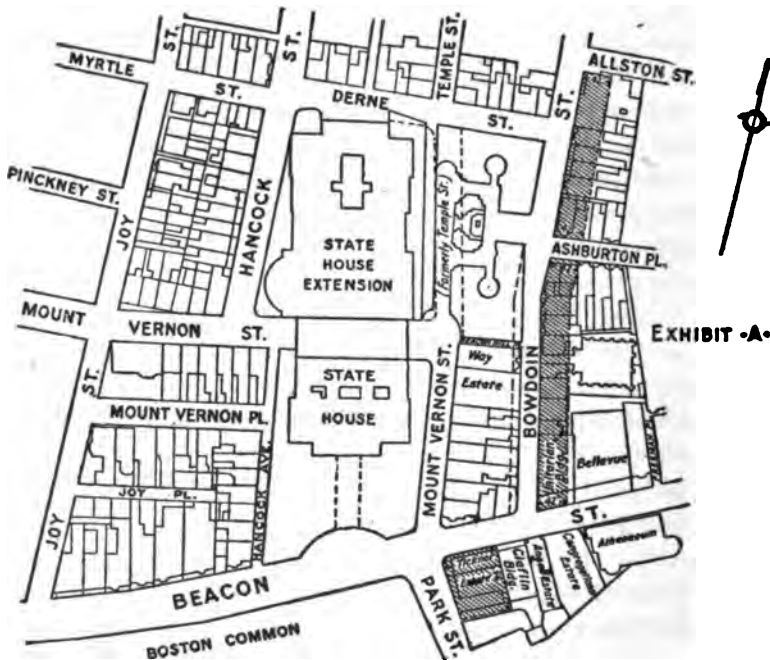
3. The land between Mount Vernon Street and Bowdoin Street south of the Way estate to Beacon Street was taken on July 17, 1894, under St. 1894, c. 532, and the buildings thereon, and upon the Way estate, — which had been taken on May 26, 1888, under St. 1882, c. 262, — from Beacon Hill Place to Beacon Street were removed under St. 1900, c. 382, in the autumn and winter of 1900-1.

4. The petitioner never applied for, received or was awarded any damages under any of the acts above mentioned, and was not in fact damaged thereby or by anything done thereunder.

5. Bowdoin Street was widened on the westerly side to a width of forty feet and its grade lowered, and the park south

of Beacon Hill Place was laid out, between August, 1901, and the autumn of 1902.

6. A diagram of the territory as it was before the removal of the buildings south of Beacon Hill Place is appended hereto marked Exhibit A,—the land affected by the limitation of the height of buildings under St. 1902, c. 543, § 1, being indicated by shading, and the westerly line of Bowdoin Street as widened being indicated by a dotted line.



*H. W. Putnam*, for the petitioner, in support of the contention that on a petition under the act for the assessment of damages the partial unconstitutionality of the act could be corrected and the erroneous part disregarded, cited *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *County Court v. Griswold*, 58 Mo. 175; *Isom v. Mississippi Central Railroad*, 36 Miss. 300; *Brunswick Water District v. Maine Water Co.* 99 Maine, 371; *Tripp v. Overocker*, 7 Col. 72; *Cunningham v. Campbell*, 33 Ga. 625, 639; *Montgomery County v. Schuylkill Bridge Co.* 110 Penn. St. 54, 58, 59.

*T. M. Babson*, for the Commonwealth.

KNOWLTON, C. J. This is a petition for an assessment of damages to property, under the St. 1902, c. 548, § 2. The principal question relates to the right to set off benefits to the property, received from the improvement of the State House and the grounds adjacent thereto. The first section of the statute referred to limits the height of buildings, to be erected or rebuilt, abutting on Bowdoin Street between Allston Street and Beacon Street, to one hundred feet above the highest grade of that part of Bowdoin Street on which the building abuts, and limits the height of buildings to be erected on Beacon Street between the Claflin Building and Park Street to seventy feet above the highest grade of Beacon Street. The St. 1901, c. 525, provided for a change of the grade of Bowdoin Street.

Section 2 of the act first mentioned is as follows: "Any person owning land on or within forty-two feet of Bowdoin Street, between Allston Street and Beacon Street, or on or within ninety-five feet of Beacon Street between the Claflin Building, so-called, and Park Street, whose property is damaged more than it is benefited by the improvement of the State House, consisting of the limitation of the height of buildings on said land, the laying out and grading of said streets, the removal of buildings between Hancock Street and Bowdoin Street, the reconstruction and extension of the State House and the construction of the park between Bowdoin Street and the State House, may, within two years after the passage of this act, and not afterward, file in the office of the clerk of the Superior Court for the county of Suffolk, his petition for a jury to determine such damage, and a jury of said court shall thereupon determine the question, under the rules of law, so far as they are applicable, under which damages for the laying out of highways under the Revised Laws are determined. If the jury find that the petitioner is damaged more than he is benefited by said improvement they shall determine the amount of the difference, and the Commonwealth shall pay the same; and if the jury shall not so find, judgment shall be entered for the Commonwealth, costs taxed and execution issued therefor against the petitioner as in civil cases. The city of Boston shall repay to the Commonwealth all damages which the State shall be required to pay for the change of grade of Bowdoin Street made

under authority of the Governor and Council, and for all expenses incurred in making such change."

The controversy in the present case relates only to the damages claimed on account of the limitation of the height of buildings on Bowdoin Street. About the damages found by the auditor and allowed by the court on account of the change of the grade of the street, no question is made by either party. The question is whether the damages for the limitation of the height of buildings are to be assessed as is provided by the statute, with a deduction of the benefit received from the general improvement mentioned, or without any deduction.

There is no doubt as to the true meaning of the statute in this particular. The provision for the recovery of these damages is only for those whose property is damaged more than it is benefited by the improvement stated, of which this limitation of the height of buildings is treated as a part. The contention of the petitioner is that this statute is unconstitutional in prescribing a set-off of benefits against the damages other than the benefits that result under the statute which authorizes a taking. This contention includes the proposition that there is a taking of property under the right of eminent domain, as well as the proposition that the compensation cannot be diminished by such a set-off as is prescribed.

It was decided in *Welch v. Swasey*, ante, 364, that Sts. 1904, c. 383, and 1905, c. 383, and the orders of the commissioners under them which limit the height of buildings in all parts of the city of Boston, without compensation to property owners, are constitutional. The limitation prescribed for buildings on this street in the statute now before us is no greater than under the statute just mentioned for buildings in most parts of the city of Boston, and it is no greater than that prescribed for buildings in places where the reasons for enforcing such a limitation, in the exercise of the police power, are but little if any more cogent than they are for such a limitation here. If the Legislature had put this restriction upon the erection of buildings in a statute dealing with such property generally, in the exercise of the police power, without providing compensation, we should think it plain that the statute would have been constitutional.

By the St. 1901, c. 525, § 3, precisely the same restriction was put upon the height of buildings on this street that we find in the St. 1902, c. 543, and there was no provision for compensation. The inference is strong that the Legislature intended this part of that statute as an exercise of the police power, and not a taking of property under the right of eminent domain. It is only upon this assumption that the constitutionality of the provision in that act can be upheld. The Legislature is presumed to have proceeded under the Constitution, rather than in violation of it. On the other hand, there are considerations that might be urged with much force against the contention that this part of that statute was enacted in the exercise of the police power. It is entitled, "An Act relative to the improvement of the State House grounds." It deals with the height of buildings only in a small area very near the State House, when considerations relative to the public health, the public safety and the public comfort would be equally applicable to other parts of the city.

If the provision in the St. 1901, c. 525, was enacted as an exercise of the police power, the natural construction of the provision for damages, in the section above quoted, would be, that it was made broad enough to include every kind of detriment on one side, even though the landowner might not be entitled to damages for it under the constitution, and in like manner to include all benefits from the general improvement on the other, and to give the owner the balance, if the damages exceeded the benefits.

If, on the other hand, the limitation is to be treated as a taking of property under the right of eminent domain, the owner is entitled to compensation if the right taken is of any value. Of course, compensation is to be measured by the effect of the taking, for the public use referred to in the statute, upon the value of the property, having reference to the effect of the taking for the prescribed use upon the property that is left, as well as to the value of the right taken, considered by itself alone. The statute shows that the restriction upon the height of buildings on Bowdoin Street was treated by the Legislature as a part of the general improvement of the State House and the grounds about it, which had been begun several years before,



and was then unfinished. It is a grave question whether, by treating these changes made under different statutes as one general improvement, and providing that this restriction upon buildings should be a part of the improvement, the Legislature could limit compensation for a right of property taken to its value diminished by the value of the benefit received by the remaining estate from the general improvement.

We do not find it necessary to decide these questions in this case, for the petition is brought under the section above quoted, and unless that section is valid, the petitioner has no standing before the court. The petitioner is described in the petition as one whose property is damaged "more than it is benefited by the improvement of the State House, consisting of the limitation of the height of buildings on said land, the laying out and grading of said streets, the removal of buildings between Hancock Street and Bowdoin Street, the reconstruction and extension of the State House and the construction of the park between Bowdoin Street and the State House ; " and it "prays that the damages which it has sustained as aforesaid may be assessed by a jury of this honorable court as provided in said acts and amendments thereto." The only jurisdiction to which the petitioner appeals is the jurisdiction created by this section. The only damages which the petitioner asks to have assessed are the damages given by this section. The assessment made by the auditor and confirmed by the court was in accordance with the terms of this section. In this proceeding the petitioner is estopped from questioning the validity of this section, upon which alone its petition is founded. *Daniels v. Tearney*, 102 U. S. 415. *Davis v. Wakelee*, 156 U. S. 680. By bringing the petition it has affirmed the validity of the taking and of the provision for giving damages contained in this section. The respondent has conceded the validity of both. There is no issue before the court as to the constitutionality of the taking, or of the method provided for the assessment of damages. See *Wellington, petitioner*, 16 Pick. 87, 97; *Hingham & Quincy Bridge v. County of Norfolk*, 6 Allen, 358, 357.

The petitioner refers to the familiar rule of law that unconstitutional provisions of a statute are sometimes separable, leaving the act constitutional and valid in one part and unconstitutional

in another part. *White v. Gove*, 183 Mass. 333. *Edwards v. Bruorton*, 184 Mass. 529. This rule is not applicable to the present case because, first, the petition is founded on the part of the statute which is alleged to be unconstitutional, and secondly, because the different parts of the act relating to the height of buildings in Bowdoin Street and the assessment of damages are so connected that they do not seem to be separable. Judging from the provisions of the statute, it cannot be assumed that the Legislature would have passed the first section if it had understood that the second could not be given effect.

There is nothing in the case to take it out of the general rule as to the allowance of interest upon damages suffered.

*Judgment according to the finding and ruling of the Superior Court.*

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### JESSE B. LEONARD vs. INHABITANTS OF WEYMOUTH.

Norfolk. November 20, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Practice, Civil, Costs. Trustee Process. Scire Facias.*

In an action of *scire facias* against one who, having been summoned as trustee in an action begun by trustee process, has been defaulted and has been charged as trustee, the plaintiff under R. L. c. 189, § 76, can recover the costs of the action of *scire facias*, but under § 72 of the same chapter he cannot recover costs for his travel and term fees included in the judgment in the original action in which the trustee was defaulted, if in the action of *scire facias* the plaintiff has recovered enough property of the original defendant to pay such term fees and travel although not enough to pay the amount of the damages included in his judgment.

SCIRE FACIAS for the amount of an execution dated July 5, 1904, issued on a judgment recovered in the Superior Court by the plaintiff in an action against William D. Davis and Arthur B. Davis as copartners doing business under the firm name of Davis Brothers, wherein the town of Weymouth was summoned as trustee. Writ dated October 17, 1904.

At the trial in the Superior Court before *Harris, J.*, without a jury, it appeared that the original action above referred to was one of contract begun by a writ dated November 23, 1899, issued out of the District Court of East Norfolk, and returnable therein on December 9, 1899, on which date it was entered; that William D. Davis was the only person then named as defendant in the writ, the town of Weymouth being named as trustee and having been served as such; and that on March 13, 1900, at the instance of the plaintiff, the district court allowed a motion making Arthur B. Davis a co-defendant.

The proceedings in the original action in the district court and on appeal in the Superior Court are described in the opinion. The judgment in that action was for \$79.50 damages and \$66.02 costs, and execution was awarded for those sums against the goods, effects and credits of the defendants in that action in the possession of the town of Weymouth, the defendant in the present action.

In the present action the judge found for the plaintiff and assessed damages in the sum of \$145.52 and \$7.28 interest from the date of the demand on execution, which was August 3, 1904, making a total of \$152.80, together with costs on the *scire facias*. The defendant alleged exceptions.

*A. P. Worthen*, for the defendant.

*J. P. Barlow*, for the plaintiff.

KNOWLTON, C. J. This is an action of *scire facias*, founded upon a trustee process in which the present defendant was summoned as trustee. Due service of the original writ was made, but the trustee did not at any time appear or answer in the action. The original writ was returnable in the District Court of East Norfolk, and a docket entry in that court shows that the trustee was discharged. So far as appears, that entry ought not to have been made, but the trustee should have been defaulted and charged. From the judgment of the district court in favor of the plaintiff as against the defendant, and discharging the trustee, the plaintiff appealed to the Superior Court. In the Superior Court judgment was entered for the plaintiff, and execution was issued against the goods, effects and credits of the defendants in the hands and possession of the trustee, the present defendant. Although it does not more formally appear

in the record before us, we must assume that the trustee was charged upon its failure to appear and answer. Thereupon, demand was duly made by an officer under the execution, and this action of *scire facias* was subsequently brought. It is agreed that, at the time of the service of the original writ, this defendant had, in the hands of the town treasurer, \$90 belonging to the defendants in that action, for personal services, of which \$20 was exempt from attachment, as the action was not for necessities.

On these facts, the judgment should have been for \$70 and interest, and the costs of the present action. The liability for costs is founded on the express provisions of the R. L. c. 189, § 76, inasmuch as there was a default of the trustee in the original action.

A trustee "may prove any matter which may be necessary or proper for his defence in the action on the *scire facias*." R. L. c. 189, § 48. *Thompson v. King*, 173 Mass. 439. *Fay v. Sears*, 111 Mass. 154. *Hoyt v. Robinson*, 10 Gray, 371, 373.

The plaintiff contends that, under the R. L. c. 189, § 72, the defendant is liable for the plaintiff's costs in the original action, out of its own goods and estate, in addition to the liability for the debt due the original defendants. This liability for a plaintiff's travel and term fees exists when a trustee, dwelling or having his usual place of business in the county in which the writ is returnable, neglects to appear and answer without sufficient reason. But it exists only when the plaintiff recovers judgment, and does not otherwise receive his costs. It is intended for the protection of a plaintiff from loss of costs when, through the neglect of the trustee, he proceeds with his case and does not receive enough to cover these costs. In the St. 1794, c. 65, § 3, where the provision first appears, the language is, "unless such costs shall be duly recovered against the goods, effects, or credits of the principal in the hands of a trustee." This language was considered in *Cleveland v. Clap*, 5 Mass. 201, 209, in which the court said, "If the creditor is indemnified, as to the costs, out of the debtor's effects, whether in his own hands or in the hands of any trustee, the intent of the statute is satisfied."

In accordance with this statement, the language of the statute

was changed in the Rev. Sts. c. 109, § 54,\* so as to read, provided that "his said costs are not otherwise recovered and received by him." This refers to their recovery and receipt from the effects in the hands of the trustee, or from any other source. Inasmuch as the plaintiff recovers from the defendant in this action more than enough of the property of the original defendants to pay the term fees and travel in the original action, this defendant is not liable for these costs under the section relied upon.

*Exceptions sustained.*

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CHARLES H. CAVE vs. JOSEPH C. OSBORNE.

Middlesex. November 20, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Contract, Implied: common counts, Performance and breach. Words, "Tender."*

In an action to recover an instalment of the purchase price and sums of money expended for improvements upon land which the defendant agreed to convey to the plaintiff under an oral contract, which afterwards the defendant repudiated and refused to perform, the plaintiff in order to recover must show that he was ready and willing and offered to perform his part of the contract.

In an action on an executory contract requiring the payment of purchase money on the part of the plaintiff, if the judge in charging the jury makes use of the word "tender" in a popular sense as meaning a readiness, willingness and ability to perform providing the other party performs his part, and the plaintiff does not ask the judge to explain the sense in which the word is used, it will be assumed that the word was used and understood in such popular sense, and the plaintiff afterwards cannot complain because the use of the word in its technical sense would have been inaccurate.

CONTRACT, to recover an instalment of the purchase price and sums of money expended for improvements upon land which the defendant agreed to convey to the plaintiff under an oral contract, which, as the plaintiff alleged, afterwards was repudiated by the defendant. Writ dated October 4, 1901.

At the trial in the Superior Court before *Harris, J.* it appeared in evidence that the plaintiff, on or about July 20, 1901,

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\* Now R. L. c. 189, § 72.

made an oral contract with one Place, the authorized agent of the defendant, to purchase certain land in Middleborough belonging to the defendant for the sum of \$150, of which \$25 was to be paid at once, \$25 in three months thereafter and the rest in monthly instalments of \$5 a month.

The property in question consisted of two lots of land, upon one of which was an old barn which had been disused for many years, and before the agreement of purchase it was understood that the plaintiff was purchasing for the purpose of making a home for himself and his family, with a view to rebuilding or repairing the barn so as to make it a habitable home. On July 29 the plaintiff went to the land in question and began the work of repairing and rebuilding the barn with the knowledge and consent of the owner and of the owner's agent. In a short time thereafter the plaintiff's family came to Middleborough and began to occupy the place, while the plaintiff continued his work of making improvements thereon.

The plaintiff introduced evidence that thereafter, on or about August 7, 1901, he had an interview with the defendant, in which the defendant agreed to sell him the premises for the price of \$75, the other terms to remain as before.

The plaintiff also introduced evidence that after this interview he continued the work of improving the property, and that the defendant, on or about August 17, told him that he did not think he could carry out his agreement, as he was bound to his agent for his commission of \$100 and he could not get out of it without giving Place a deed to the premises. The plaintiff replied that he should hold him to his agreement, and forbade him to give any deed to Place, and said that he would pay the whole of the price as soon as he could, or he would pay what he could and give him a mortgage for the balance; that accordingly, on August 31, having already paid \$25 to Place, the defendant's agent, he went to the defendant's house, tendered him \$31 in cash and asked for his deed and said he would give a mortgage for the balance, but that the defendant refused to give him a deed or to accept the tender of cash.

Evidence was introduced by the defendant tending to show that the interview between the plaintiff and the defendant took place at a later date than August 7, and that the defendant, after

agreeing on that day to accept \$75 as the purchase price for the place, immediately, or soon after on the same day, repudiated the agreement.

It further appeared on cross-examination of the plaintiff that at the interview of August 31, when the plaintiff tendered the \$31 in cash, he did not have with him a mortgage drawn or ready to be executed.

In charging the jury the judge, among other instructions, instructed them as follows:

"Now, if he did make a contract, either the one or the other, if he substituted one for another, then the question is, Did he comply with the terms of that contract? Mr. Osborne has stated that he was ready to sell the place for \$75 cash, that he wouldn't sell the place upon instalments, and that he ratified the action of Mr. Place in selling for him, except so far as the terms of deferring payments of five dollars a month for a considerable period, and that Mr. Place said, 'Very well, I will pay \$75,' and he said, 'All right, the trade is complete; then I ratify the contract upon those terms,' and Mr. Place then took the property upon his hands, paying to him the money.

"If the contract was made and this plaintiff didn't comply with the terms of the contract which he himself says were entered into, either the \$75 contract to pay the same in full or to give part mortgage, did he ever tender a mortgage? Did he ever tender the full amount of \$75? Those are questions of fact for you. If he didn't, then he is not entitled to recover, because the whole failure of the transaction comes by reason of his own neglect, and not by reason of the owner or of the owner's agent."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions "to the portion of the charge in regard to the plaintiff's offer or tender to comply with the terms of the contract," and particularly to the language above quoted.

*N. Washburn*, for the defendant.

*W. B. Farr*, for the plaintiff.

SHELDON, J. The substantial effect of the instructions given to the jury was that the plaintiff would be entitled to recover if he showed that he had made such an agreement as he testified that he made with the defendant for the purchase of the land in

question, that he himself had complied with the terms of the agreement so far as the parties had gone, and had offered to pay the full agreed price either wholly in cash or partly in cash and partly by a mortgage upon the property, and that the defendant refused to comply with the agreement; but that the plaintiff could not have a verdict unless he on his part did comply with the terms of the agreement by paying or tendering the agreed price, if, that is, the failure of the transaction came by reason of his own neglect and not from the fault of the defendant.

The oral agreement made between these parties was not void from the beginning; it was simply unenforceable by action if the objection that it was not in writing was taken against its enforcement. *DeMontague v. Bacharach*, 181 Mass. 256. If the defendant did repudiate the agreement for this reason, the plaintiff could recover back whatever payments he had made under it to the defendant. *DeMontague v. Bacharach*, 187 Mass. 128. *Cromwell v. Norton*, ante, 291. Such part payments would not take the case out of the statute of frauds. *Thompson v. Gould*, 20 Pick. 134. So, if the defendant without any sufficient excuse refused to make the conveyance and thus himself violated the agreement in an essential particular, the plaintiff could elect to treat the agreement as abandoned, and could hold the defendant to repay to him any partial payments already made therefor, as if they had not been made under a special contract. *Brown v. Woodbury*, 183 Mass. 279, 282, and cases there cited.

But whether the plaintiff's cause of action rested on the one or the other ground, it was equally necessary for him to show that he was himself in no default, or, as the judge at the trial put it, that the transaction failed because of the defendant's fault and not by reason of the plaintiff's own neglect. If he was not himself ready and willing to carry out the agreement, he cannot maintain this action. *Pead v. Trull*, 173 Mass. 450. This was substantially the instruction given to the jury; and we are of opinion that it was right.

Not having asked for more specific instructions at the trial, the plaintiff cannot now complain of the judge's use of the word "tender." It is doubtless true that this word, as commonly used in such a connection, imports nothing more than the manifesta-



tion of a present readiness, willingness and ability to perform, provided the other party will perform on his part. *Cook v. Daggott*, 2 Allen, 439, 441. But because this meaning is involved in the word, its use was sufficient in the first instance. If the plaintiff had thought that his interests required it, he doubtless would have asked the judge to make this explanation. *Barker v. Loring*, 177 Mass. 389. *Commonwealth v. Meserve*, 154 Mass. 64, 75.

*Exceptions overruled.*

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ELIPHALET J. FOSS vs. ZACHIAS R. ATKINS & others.

Barnstable. November 20, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Land Court. Practice, Civil, Appeal.*

Under St. 1902, c. 458, § 1, St. 1904, c. 448, § 8, and St. 1905, c. 288, on an appeal from the Court of Land Registration or the Land Court to the Superior Court, the issues for the jury must be framed in the court from which the appeal is taken, and such a framing of issues is necessary to complete the appeal.

LORING, J. This case comes up from the Superior Court upon a report.

From the report it appears that on February 16, 1906, the Land Court entered a decree in favor of Atkins and against Foss. On March 16, 1906, Foss took an appeal to the Superior Court. On the same day he filed in the Land Court a paper entitled "Issue to the Jury." "Said paper entitled 'Issue to the Jury,' was not submitted to or approved by any judge of the Court of Land Registration, prior to the entering thereof in the Superior Court, and was in no way called to his attention, otherwise than by the aforesaid filing." On the next day, March 17, 1906, the appellant entered in the Superior Court his appeal and the paper entitled "Issue to the Jury," together with certified copies of all material papers.

The respondents made a motion in the Superior Court to dismiss the appeal on the ground that no issue for a jury was

framed in the Land Court. The Superior Court ruled that the motion ought to be allowed and the appeal dismissed.

Under St. 1898, c. 562, § 14, St. 1899, c. 131, § 2, and R. L. c. 128, § 13, issues for the jury in the Superior Court were to be framed in the Superior Court if either party within the time allowed for entering appearance claimed a jury. This was changed by St. 1902, c. 458, § 1. The language of that act is explicit in requiring the issues to be framed in what was then the Court of Land Registration, and which is now the Land Court. See St. 1904, c. 448, § 10. This change, originally made by St. 1902, c. 458, § 1, has been continued in force since then. St. 1904, c. 448, § 8. There is nothing to the contrary in St. 1905, c. 288.

The provision that issues shall be framed in the Land Court means that they shall be framed by the court on application to the court by the appellant, and until the appellant has brought his motion for the framing of issues to the attention of the court and has had them framed by the court his appeal is not complete. The framing of issues is as necessary to complete an appeal from the Land Court as is the filing of objections in case of an appeal from a probate decree, as to which see *Bartlett v. Slater*, 183 Mass. 152. The fact that the issues may be modified in the Superior Court, (as to which see *Luce v. Parsons*, 192 Mass. 8,) does not affect this conclusion.

The ruling of the Superior Court was right.

*Appeal dismissed.*

*W. L. Williams*, for the appellant.

*G. A. King*, for the appellees, submitted a brief.

HARTLEY AVERILL & another, trustees, vs. CITY OF BOSTON.

MARY A. TAPPAN, administratrix, vs. SAME.

SAME vs. SAME.

Suffolk. November 20, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, LORING, & SHELDON, JJ.

*Contract, What constitutes, Performance and breach. Election. Limitations, Statute of. Municipal Corporations.*

The owners of land in a city, on which it was proposed to lay out a street, signed an instrument in writing under seal stating that in consideration of the immediate laying out and construction of the proposed street, and of the delaying of the assessment of betterments until the amount of the damages caused to the signers by the taking of their land and the cost of the construction should be determined, the owners of the land agreed that the payment of damages should be delayed until the balance due from each of them after offsetting the betterments had been determined, and further agreed to accept in payment for their land to be taken for the street certain prices per square foot there stated. The instrument was not signed by any one in behalf of the city. The city began the construction of the street but did not complete it within a reasonable time, and it was decided by this court in a previous case that the city having failed to complete the street had not complied with the terms of the offer of the landowners, which therefore never became binding on its signers, who accordingly could recover their damages without waiting for the assessment of betterments. The city was ordered by a writ of mandamus to finish the construction of the street before a certain day. More than six years after the work of construction of the street was begun, and before any assessment of betterments had been made, some of the landowners who had signed the instrument, brought actions for their damages, to which the city pleaded the statute of limitations. The plaintiffs contended that their causes of action arose within six years, namely, when after the expiration of a reasonable time the city had failed to complete the street, and that by such failure the plaintiffs were released from their promises, under seal, which they contended had been binding up to that time, not to sue for their damages until the betterments had been assessed. *Held*, that the plaintiffs' causes of action for damages accrued when the construction of the street was begun; that, if, waiving the city's delay in the work of construction, they elected to avail themselves of the instrument signed by them as being a binding contract, they must abide by all the terms of such contract and could not sue for damages until the betterments were assessed; that if, on the other hand, they sought to set aside the instrument, because the city had failed to do that which would make it a binding contract, they must treat it wholly as a nullity, and their actions in that case were barred by the statute of limitations.

An offer under seal does not become a contract unless it is accepted.

THREE ACTIONS OF CONTRACT against the city of Boston for awards made by the street commissioners of that city for damages from the laying out of Queensberry Street and Jersey Street. Writs dated December 28, 1905.

In each of the cases the answer, among other matters, set up the statute of limitations.

In the Superior Court the cases came on to be heard together before *Fessenden, J.* In the first case, in which the plaintiffs, as trustees, claimed damages from the laying out of Queensberry Street, he ruled *pro forma* that the plaintiffs were entitled to judgment for the sum of \$8,829 with interest from September 22, 1898, and accordingly ordered judgment for the plaintiffs in the sum of \$12,890.80. In the second case, in which another plaintiff, as administratrix, claimed damages from the laying out of Queensberry Street, he ruled *pro forma* that the plaintiff was entitled to judgment for the sum of \$14,251 with interest from September 23, 1898, and accordingly ordered judgment for the plaintiff in the sum of \$21,661.52. In the third case, in which the same plaintiff as in the second case claimed damages from the laying out of Jersey Street, he ruled *pro forma* that the plaintiff was entitled to judgment for the sum of \$14,451.50 with interest from September 22, 1898, and accordingly ordered judgment in the sum of \$21,099.19. At the request of the parties he reported each of the three cases for determination by this court. In each case, if the ruling and order for judgment were right, the judgment was to stand; otherwise, such judgment was to be entered therein as law and justice might require.

The cases were submitted upon agreed facts, which in the first and second cases, both relating to Queensberry Street, were the same, and were as follows:

1. On February 10, 1897, an agreement, dated August 17, 1896, a copy of which is hereto appended marked Exhibit C, executed by the plaintiffs Hartley Averill and Edwin B. Ginn, trustees, and by all other abutters upon a proposed street in Boston afterwards named Queensberry Street, was delivered to the board of street commissioners of Boston.

2. On July 15, 1897, the board of street commissioners after due notice of their intention so to do, and hearing thereon, duly laid out and ordered constructed a certain highway named

Queensberry Street by an order, a copy of which was appended, and took therefor certain land belonging to the plaintiffs as shown upon the Humbert Plan referred to in the order of laying out, and awarded to them as damages to their property by the laying out and construction of that street the sum of \$8,829, in accordance with the terms of the agreement marked Exhibit C and with the prices of land therein stipulated to be paid them therefor.

3. On September 22, 1898, the city of Boston entered upon the lands taken by the order and began the filling of Queensberry Street for the purpose of constructing the street, and a reasonable and practicable time for completing and surfacing Queensberry Street in accordance with the order would have been until January 1, 1900. It was not then completed, the sewer called for by the order was not completed until November 5, 1903, and the street has not been completed or surfaced in accordance with the provisions of the order of the board of street commissioners. The street has never been posted as a private way but has been left open and unobstructed since January 1, 1899, and no betterment assessment has been laid for the street by the board of street commissioners.

4. The filling of Queensberry Street was begun on September 23, 1898, and was finished on January 28, 1899, using 58,222 cubic yards of filling at a cost of \$29,693.22 for the filling and \$3,638.85 for teaming, labor, material, and incidentals.

5. The construction of the sewer in Queensberry Street was begun on July 3, 1902, and was finished on November 2, 1903, at a cost of \$50,194.98.

6. The laying of water pipes in Queensberry Street was begun on October 31, 1898, and was finished on November 24, 1898.

7. The gas pipes in Queensberry Street were laid in October, 1899.

8. The estimated cost of finishing Queensberry Street in accordance with the order of the street commissioners is \$20,000.

9. Any further facts which appear in the suits of *Aspinwall v. Boston*, or *Tappan v. Boston*, [191 Mass. 441,] may be referred to and treated as facts in this case so far as material.

10. A writ of mandamus has been issued from the Supreme Judicial Court on May 22, 1906, commanding the completion

of Queensberry Street on or before December 1, 1906, upon a petition filed by the plaintiff and others on October 5, 1905.

Exhibit C.

"We, the undersigned owners of land within the lines of a proposed street south of and parallel with Boylston Street extension in the City of Boston, and five hundred and ninety-seven (597) feet distant southerly and from the southerly line of said Boylston Street extension, and running at a width of fifty feet from Boylston Road in the Fens southerly to Audubon Road in said Fens shown on a plan marked 'Back Bay Lands, Pierre Humbert, Jr., City Surveyor, April 10, 1894,' on file in the Office of the City Engineer of said City, in consideration of the immediate laying out and construction of said proposed street at a width of fifty feet under the provisions of chapter 323, of the acts of the year 1891, and acts in amendment or addition thereto, and of any assessments which may be laid upon our several estates for the cost of said laying out and construction being delayed until the damages caused to us severally by the taking of said land and the cost of the construction of said street shall be determined and of said damages being offset against the proportionate part of said cost which may be levied upon our respective estates, agree that the payment of said damages shall be delayed until the balance due from us severally after making said offset has been determined.

"And we severally agree that we will accept as payment for so much of our said land to be taken for said street as lies within one hundred and twenty-five (125) feet of said Audubon Road or said Boylston Road the sum of three (\$3.00) dollars per square foot and for so much of our said land as lies more than one hundred and twenty-five (125) feet from said roads the sum of one dollar (\$1.00) per square foot.

"It being stipulated that the execution of this paper by any owner upon this agreement shall be tantamount to the execution of this original agreement.

"Witness our hands and seals this seventeenth day of August, A. D. 1896."

Here followed the signatures of different landowners, including in the first case those of the plaintiffs as trustees and in the

second case that of the plaintiffs intestate. There was no signature in behalf of the city of Boston. In the printed reports of the cases there was no designation of seals after the signatures, but in the defendant's answer in each of the three cases the instrument marked Exhibit C was alleged to have been executed by the plaintiffs and other landowners "under their hands and seals." See also *Aspinwall v. Boston*, 191 Mass. 441 at page 444.

In the third case the agreed facts differed from those in the second case in relating to Jersey Street instead of to Queensberry Street. In the third case the instrument marked Exhibit C was dated March 25, 1897. The material provisions were the same as in the corresponding exhibits in the first and second cases.

The filling of Jersey Street was begun on September 22, 1898, and was finished on December 17, 1898, using 45,000 cubic yards of filling, at a cost of \$18,817.47 for the filling, and the further sums of \$914.70 for labor, teaming, and materials, and \$41.06 for labor and advertising.

The construction of the sewer in Jersey Street was begun by the city on August 29, 1899, and was finished on December 17, 1903, at a cost of \$98,249.91.

The laying of the water pipes in Jersey Street was begun on August 29, 1899, and was completed on October 2, 1899.

In June, 1903, nine hundred and seven feet of gas pipe were laid in Jersey Street, from Boylston Street to Audubon Road, and on June 10, 1904, five hundred and forty-eight feet of gas pipe were laid in Jersey Street from Boylston Street to Brookline Avenue.

The estimated cost of finishing Jersey Street, in accordance with the order of the street commissioners, was \$21,000.

*H. W. Putnam*, for the plaintiffs. 1. The agreements, being under seal, were irrevocable unilateral contracts binding without consideration. *Mansfield v. Hodgdon*, 147 Mass. 304, 307. *O'Brien v. Boland*, 166 Mass. 481, 483. *Willard v. Tayloe*, 8 Wall. 557, 564. *Graham v. Middleby*, 185 Mass. 349, 355. Those in *Crocket v. Boston*, 5 Cush. 182, *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass. 528, and *Springfield v. Harris*, 107 Mass. 532, not being under seal, were mere revocable offers until performance of the consideration.

2. The agreements therefore prevented actions on the awards

until failure of condition subsequent by non-completion of the streets on January 1, 1900, and then became void, leaving the signers free until January 1, 1906, to sue without awaiting the assessment of betterments. *Aspinwall v. Boston*, 191 Mass. 441, 447. *Gray v. Gardner*, 17 Mass. 188. *Thayer v. Connor*, 5 Allen, 25, 27. *Hodsdon v. Guardian Ins. Co.* 97 Mass. 144, 147. *Semmes v. Hartford Ins. Co.* 18 Wall. 158. *New Haven & Northampton Co. v. Hayden*, 107 Mass. 525, 531.

*T. M. Babson*, for the defendant.

KNOWLTON, C. J. These are actions at law to recover in each case the amount of an award in favor of the plaintiffs, for the taking of land for a public street. Two of the cases relate to land taken for one street and the other relates to land taken for another street. One of the streets was laid out and ordered constructed on July 15, 1897, and the other on July 15, 1898. The land taken for each street was entered upon and the work of construction was begun on September 22, 1898. Apart from the contracts hereinafter referred to, the award in each case became payable on that day. R. L. c. 48, § 13. *Aspinwall v. Boston*, 191 Mass. 441. Each of these actions was brought on December 28, 1905, and the defendant has answered, among other things, the statute of limitations.

It is plain that the liability is of the kind that is barred under the general statute of limitations if no action is brought to enforce it within six years after the cause of action accrues. R. L. c. 202, § 2. The only ground on which the plaintiffs seek to avoid the effect of this statute is the existence of two contracts, in the same general terms, one pertaining to each street, signed by the plaintiffs and others in one case and by the plaintiffs' intestate and others in the other two cases, a copy of which is given in *Aspinwall v. Boston*, *ubi supra*. It was decided in the case last cited, upon facts that appear in these cases, that the contract was not binding upon the plaintiffs because the city failed completely to accept it by doing all that was to be done as a consideration for the promises contained in it. It was therefore held that the plaintiffs might recover the damages awarded for the taking of their land. That action was brought before the expiration of six years, and the statute of limitations was not applicable to it.



In *Tappan v. Boston*, heard at the same time, both cases being considered in the same opinion, it was decided that the petitioners might have a writ of mandamus to compel the completion of the streets, and it was intimated that, inasmuch as the petitioners had elected to treat the contracts as binding upon both parties, the city might not be permitted hereafter to set up its own neglect to defeat the rights of the petitioners growing out of the respective contracts, even though the petitioners might have availed themselves of this neglect, and have treated the acts of the city as ineffectual to prevent them from collecting their damages. It is agreed in each of the present cases that the city has been ordered by a writ of mandamus to finish the construction of the streets before December 1, 1906.

The plaintiffs now seek to set up these contracts as binding upon them, so far as to postpone the time when the cause of action accrued and to relieve them from the bar of the statute of limitations, and to set them aside in those parts which purport still to postpone the collection of their damages until there can be a set-off of benefits. This they cannot do. If they elect to avail themselves of the contracts, waiving the city's delay in the work of construction, they must abide by them in all their parts. If they elect to set them aside because the city has failed to do that which makes them binding, they must treat them as nullities. In the first place each writing was a mere offer, and it could be withdrawn at any time before it was acted upon in accordance with its terms. The city did not attempt to bind itself, and could not bind itself by an executory contract of this kind. *Aspinwall v. Boston*, *ubi supra*, and cases cited. The offer became binding only by the doing of the acts referred to, which were to furnish the consideration. *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass. 528. *Crocket v. Boston*, 5 Cush. 182. *Springfield v. Harris*, 107 Mass. 532. It is not a bilateral contract, binding from the beginning, with a liability for a breach. If the city failed to act upon it so as to furnish the full consideration within a reasonable time, the plaintiffs might refuse to be bound by it. But in that event they could not retain the benefits of it, and use it to give themselves rights which otherwise they would not have in a future proceeding.

Apart from the contracts, the plaintiffs' claims are barred by

the statute of limitations. Each contract must be taken as a whole. If it is treated as of no effect because the consideration was not furnished, it cannot avail the plaintiffs to take the cases out of the statute of limitations. If it is relied upon by the plaintiffs to prevent their right of action from accruing, they must take the consequences of its provisions which forbid the maintenance of an action before the betterments are assessed.

In each of the cases the entry must be

*Judgment for the defendant.*

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**PATRICK J. HOURIGAN vs. BOSTON ELEVATED RAILWAY  
COMPANY.**

Suffolk. November 21, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence, Employer's liability.*

In an action against a street railway company by a workman, who was employed by the defendant as one of a gang of laborers to work under one P. in unloading a coal schooner at a power station wharf of the defendant, for injuries from falling into the hold of the vessel owing to the giving way and breaking of a ladder about twenty feet long which the plaintiff with one or more of the other men was ascending when they had been ordered to stop work for the day, it appeared that the ladder was put in position and was lashed by P., and there was evidence warranting a finding that the giving way of the ladder was caused by his negligence in selecting an improper piece of rope with which to lash the top of the ladder to a ring bolt in the deck. There also was evidence that P. was paid more than the other men employed in unloading the schooner, that he did manual work only when he felt like it, that it was his duty to report how many men he wanted and to report them if they did not work properly, and it also was his duty to tell the men where to shovel the coal, to whistle and tell the engineer when to hoist and when to lower the coal scoop, and to tell the men when to stop work, and that there was no other person in immediate charge of the work. *Held*, that this evidence warranted a finding that P. was a superintendent within the meaning of the employers' liability act, and that the setting up of the ladder, including the lashing of it, was a part of the work to be done under his superintendence.

TORT for personal injuries received by the plaintiff while in the employ of the defendant on April 26, 1900, at about a quarter before nine o'clock in the evening, from the breaking of a ladder

alleged to have been defective, which the plaintiff was ascending in leaving the hold of a vessel discharging coal at the wharf of the defendant's power house on Albany Street in Boston, with a first count alleging a defect in the ways, works or machinery of the defendant, a second count, at common law, alleging defective appliances, and a third count, added by amendment, alleging negligence of a person in the service of the defendant who was exercising superintendence and whose sole or principal duty was that of superintendence. Writ dated July 12, 1900.

In the Superior Court the case was tried before *Bond, J.* The material evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge so ruled, saying that there was not sufficient evidence to warrant the jury in finding that the defendant was negligent, and that, whatever negligence there was, was the negligence of a fellow servant of the plaintiff, for which the defendant was not liable. The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*C. C. Johnson*, for the plaintiff.

*E. P. Saltonstall*, (*S. H. E. Freund* with him,) for the defendant.

LORING, J. The plaintiff in this case was one of a gang of laborers employed by the defendant railway company at its central power station wharf. On the day of the accident he was sent by one Connelley, who was "the boss," with eleven to eighteen other men, to work under one Porter in unloading a coal schooner. The plaintiff was set to work with others in the hold of the schooner. At a quarter to nine o'clock in the evening Porter told the men to stop work. Thereupon the plaintiff with one other or three others started up a ladder in the forward hatch. Before he reached the top the ladder broke and the plaintiff fell to the bottom of the hold. The plaintiff's evidence showed that the rope by which the top of the ladder was lashed to a ring bolt in the deck broke and the ladder thereupon fell back, buckled and broke. The defendant introduced evidence showing that the ladder broke from the weight of four men who tried to go up on it at one time, and that the breaking of the rope was caused by the breaking of the ladder.

The ladder was some twenty feet in length, rested on the keelson and reached to the deck. It was put in position and lashed by Porter. At the bottom it was lashed around a stanchion running from the keelson to the deck. This lashing was about four feet above the keelson. The point where the ladder broke was about six or eight inches above this lashing. The ladder was put in position and lashed by Porter on the first day that the work of unloading this schooner began.

We are of opinion that the plaintiff had a right to go to the jury on the third count, in which he declared on the negligence of Porter as a superintendent in making fast the top lashing of the ladder.

There was evidence that Porter was paid more than the other men employed in unloading the schooner in question; that he did manual work only when he felt like it; that it was his duty to report how many men he wanted and to report them if they did not work properly; that it was his duty to tell the men where to shovel the coal and to whistle and tell the engineer when to hoist and when to lower the coal scoop; and that it was also his duty to tell the men when to stop work. There was no other person in immediate charge of the work. This warranted the jury in finding that Porter was a superintendent within the employers' liability act. The case comes within cases like *Knight v. Overman Wheel Co.* 174 Mass. 455, *Murphy v. New York, New Haven, & Hartford Railroad*, 187 Mass. 18, and not within cases like *Shepard v. Boston & Maine Railroad*, 158 Mass. 174; *Sullivan v. Fitchburg Railroad*, 161 Mass. 125; *Dowd v. Boston & Albany Railroad*, 162 Mass. 185; *O'Neil v. O'Leary*, 164 Mass. 387.

The jury also were warranted in finding that the setting up of the ladder, including the lashing of it, was a part of the work to be done under Porter's superintendence.

There was abundant evidence that the rope used for the top lashing was not a proper one if the top of the ladder ought to have been lashed firmly. Apart from the testimony given by the plaintiff's witnesses, that part of the case was more than proved by Porter. Porter testified that no top lashing was necessary to hold the ladder and for that reason he used "only a rope yarn," one strand of a three inch rope.

The negligence complained of was not negligence in tying the knot by which the upper lashing was tied, but in selecting an improper piece of rope for the upper lashing. That is an act of superintendence, and none the less so because the knot was tied by Porter. *McPhee v. New England Structural Co.* 188 Mass. 141, and cases cited. See also *Cunningham v. Atlas Tack Co.* 187 Mass. 51.

*Exceptions sustained.*

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MARY A. TAPPAN & another vs. STREET COMMISSIONERS  
OF THE CITY OF BOSTON & another.

Suffolk. November 21, 1906. — January 2, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Constitutional Law. Statute. Tax. Sewer.*

Section 7 of St. 1897, c. 426, relative to the sewerage works of the city of Boston, providing for the assessment of benefits, which was declared unconstitutional in *Sears v. Street Commissioners*, 178 Mass. 850, was so important a part of that statute, that the provisions of §§ 1 and 8 of the same chapter, that no sewerage work should thereafter be constructed in that city except under authority of that act, unless ordered before its passage, and that all sewers and connections made in constructing any way under St. 1891, c. 323, should be deemed to be constructed under the act of 1897, fall with the unconstitutional provisions of § 7 and are of no effect.

The provision in § 1 of St. 1899, c. 450, relative to the sewerage works of the city of Boston, that no sewerage work should thereafter be constructed in that city except under the authority of that act, unless ordered before its passage, was a re-enactment of § 1 of St. 1897, c. 426, which was void as connected inseparably with an unconstitutional provision in another section of that statute, and therefore first became effective under the statute of 1899.

Assessments for benefits from the construction of a sewer in the city of Boston, which was included in an order made on July 15, 1897, for the laying out and construction of a street under St. 1891, c. 323, and acts in amendment thereof, and was constructed in 1902 and 1903 under the same statute, can be made only under the provisions of St. 1902, c. 521, after the completion of the improvements of which the sewer is a part.

PETITION, filed June 8, 1906, for a writ of certiorari to quash an assessment for benefits from the construction of a sewer in Queensberry Street in Boston.

The case came on to be heard before *Hammond, J.*, who at the

request of the parties reserved it upon the petition, exhibits, answer and agreed facts for determination by this court, such decree to be entered therein as law and justice might require.

*H. W. Putnam*, for the petitioners.

*T. M. Babson*, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of certiorari to quash an assessment of betterments from the construction of a sewer in Queensberry Street in Boston. The only order for the establishment and construction of this sewer was included in the order for the laying out and construction of the street, made on July 15, 1897. This order was made under the provisions of the St. 1891, c. 323, St. 1893, c. 462, St. 1894, c. 439, and acts in amendment of or in addition to said acts. At the time of the assessment of these betterments the construction of the street had not been completed, and the assessment of the betterments therefor could not be made. The principal question is whether an assessment could be made on account of the construction of the sewer, apart from the construction of the street.

By the St. 1897, c. 426, § 1, which took effect on June 21, 1897, it was provided that no "sewerage work" should thereafter "be constructed in said city, except under authority of this act, unless the same has been ordered to be constructed before the passage thereof." Section 8 declared that, "All sewers and connections ordered to be made in constructing any way under the authority of chapter three hundred and twenty-three of the acts of the year eighteen hundred and ninety-one," etc., should be deemed to be constructed under the authority of this later act. Section 7 of the later act was declared unconstitutional in *Sears v. Street Commissioners*, 173 Mass. 350, and this section was so important a part of the statute that, in our judgment, it lay at the foundation of the provisions just referred to in §§ 1 and 8. We think that § 7 and these provisions were connected inseparably in the purpose of the Legislature, so that when § 7 was found to be unconstitutional they all fell together. Section 8 was expressly repealed by the St. 1900, c. 478, § 4, and this provision in § 1 was re-enacted in the St. 1899, c. 450, § 1. As this provision in the former statute was invalid, it first became effective in the St. 1899. It was then inapplicable to

the work in Queensberry Street, because the work had been ordered to be constructed before the passage of this statute.

It is an agreed fact in the case that the sewer was constructed between July 3, 1902, and November 5, 1908, and was paid for from a loan of money raised under orders authorized by the St. 1900, c. 478, "for the construction of highways already laid out." By the express terms of this statute the expense of such construction is to be assessed and collected under the provisions of c. 323 of the acts of the year 1891, and the acts in amendment thereof or in addition thereto. The St. 1902, c. 521, is an amendment of the St. 1891, c. 323, which prescribes the mode of assessing benefits from the construction of highways, including sewers, under the earlier statute. Moreover, in the St. 1899, c. 450, the course of proceeding is prescribed for the ordering and construction of sewers under that act, and upon this street nothing was done in accordance with this course of proceeding.

It seems plain that the sewer was not only ordered but constructed under the St. 1891, c. 323, and the amendatory acts, and not under the St. 1899, c. 450. It follows that the assessment should be made in accordance with the provisions of the St. 1902, c. 521, after the completion of the improvements of which the sewer was only a part.

*Writ of certiorari to issue.*



STEPHEN KEMENSKY vs. GARDNER CHAPIN & another.

Franklin. September 25, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY,  
SHELDON, & RUGG, JJ.

*Frauds, Statute of. Sale.*

A memorandum of a contract for the sale of goods which does not name the price is not sufficient to satisfy the statute of frauds.

Under an oral contract for the sale of goods by sample, a delivery of the goods by the seller upon a railroad car sent by the buyer to receive the goods for transportation to him, although it is a delivery to the buyer, does not constitute also an acceptance sufficient to satisfy the statute of frauds.

Under an oral contract for the sale of goods by sample the receipt and examination of the goods by the buyer merely for the purpose of ascertaining whether they correspond with the sample do not constitute an act of acceptance.

Where there is an oral contract for the sale by sample of goods for the price of \$50 or more, and the buyer receives and examines the goods merely for the purpose of ascertaining whether they correspond with the sample, without accepting them as those that he purchased, and arbitrarily and unreasonably refuses to accept them, if the seller sues for damages for the breach of the contract and the defendant sets up the statute of frauds, and there is no memorandum in writing of the bargain sufficient to satisfy the statute and no part payment, the plaintiff cannot recover on showing that the goods delivered by him were in accordance with the sample and that the defendant ought to have accepted them.

CONTRACT, with three counts, the first for \$397 for onions sold and delivered, the second for damages for the breach of an oral contract to purchase the same onions, and the third on an account annexed, all three counts being alleged to be for the same cause of action. Writ dated February 19, 1906.

The answer contained a general denial, alleged that the onions were sold by sample and were not in accordance with the sample, and pleaded R. L. c. 74, § 5.

In the Superior Court the case was tried before *Hitchcock, J.* The plaintiff was a Polish farmer, and testified that in 1905 he raised onions on land of one Walsh and land of one Cooley in the town of Sunderland on shares; that the onions were divided in the field, the plaintiff taking his half in each instance and storing them in the cellars of Walsh and Cooley respectively; that some time about the middle of January he took samples of onions ranging from an inch and a half in diameter to three inches in diameter in a crate and went to Boston and there saw one of the defendants; that the plaintiff showed the defendants the samples, asking eighty cents for the large onions and the defendants offering a less sum; that one of the defendants asked the plaintiff how many onions he had above an inch and a half in diameter, and the plaintiff replied that he did not know but he thought from four to five hundred bushels; that one of the defendants then said, "I will place a car on the track at North Amherst and give you fifty cents a bushel for all onions over and above an inch and a half in diameter, delivered on our car at North Amherst, Mass., and we will pay the freight"; that the plaintiff accepted the offer and left the samples of the onions with the defendants; that after the above offer, the defendants turned



to a barrel of small onions, which they had in their place of business, and picked out some small onions running from an inch to an inch and a half in diameter and said to the plaintiff, "Got any onions like those?"; that the plaintiff said he had; that one of the defendants said, "We will give you thirty-five cents a bushel for all onions below an inch and a half in diameter"; that the defendant Preston V. Chapin, the only one of the defendants with whom the plaintiff had any conversation, told the plaintiff to go home and get the onions ready according to the agreement, and that the defendants would send a car for them; that the plaintiff went home and screened the onions according to the agreement; that he notified the defendants by letter that the car had not come, and afterwards received from the defendants a letter, dated January 25, 1906, a copy of which is printed below, marked "C"; that about January 30 the car arrived at North Amherst and the plaintiff put into the car seven hundred and twenty-nine bushels of onions more than an inch and a half in diameter and ninety-four bushels less than an inch and a half in diameter; that he screened the large onions over a wooden screen, which was constructed of plank with holes that would let through an onion an inch and a half in diameter or less; that after screening the large onions, he put those more than an inch and a half in diameter in sacks of two bushels and one bushel each; that he then screened the onions that went through the screen, over a screen constructed in the same manner with holes that would let through an onion one inch in diameter, and the onions between an inch and an inch and a half in diameter, which were designated as small onions, he put in sacks of one and two bushels each; that the large onions were good, sound, merchantable onions of first quality; that the small onions were good, sound, merchantable onions; that the large onions were known and designated as No. 1 and the small onions were known and designated as No. 2; that after sacking the onions, he hauled them by team to the place where the car of the defendants was placed on the track, which was near a point called Cooley's, and loaded all of the onions upon the car and shipped them to Chapin Brothers. A shipping receipt in the ordinary form was put in showing that the Boston and Maine Railroad received from the plaintiff at Amherst station, on January 31, 1906, seven hundred and twenty-nine bushels No. 1 onions and

ninety-four bushels No. 2 onions consigned to Chapin Brothers, Rutherford Avenue, Boston, the weight of the onions stated on the receipt to be forty-three thousand pounds, with letters indicating that the weight was the shipper's weight, signed "Boston and Maine Railroad by F. A. Cady"; that on February 5 or 6 the plaintiff received from the defendants a letter dated February 3 refusing to accept the onions, a copy of this letter being printed below marked "F"; that after the receipt of this letter the plaintiff went immediately to Boston to see Mr. Chapin; that he saw Preston V. Chapin and said, "What you done with that onions?"; that Chapin said the onions were not satisfactory; that the plaintiff asked Chapin to take the onions and Chapin said he did not "know what brother was going to say."

The plaintiff further testified that the defendants refused to take the onions; that the onions had been "all mixed up" and had been injured by being frozen, and that he finally sold them for ten cents a bushel, receiving for them \$80 in all; that the freight on the onions was \$57; that the onions when he loaded them on to the defendants' car were sound and in merchantable condition and the large onions were of as good a quality as the sample shown to the defendants; that the small onions were equal to or better than the sample which the defendants showed to the plaintiff; and that they were put up into sacks in proper condition, two bushels and one bushel in a sack according to the defendants' direction.

The defendants' letter of January 25, 1906, marked "C," was as follows:

"C.

"Boston, Jan. 25, 1906.

"Mr. Stephen Kemensky,

"Sunderland, Mass.

"Box 105, care of Wm. R. Ahearn.

"Dear Sir:

"Yours of Jan. 24th received and noted. Will say that I billed out a car from here to you at North Amherst, in care of W. C. Cooley, as directed. I think it was the second day after you were in here. I will look it up and let you know in regard to it and will bill out another car to you to-morrow, as we have one here being unloaded.

"Respectfully,

"Chapin Bros."

The defendants' letter of February 3, 1906, marked "F," was as follows:

"F.

"Boston, Feb. 3, 1906.

"Mr. Stephen Kemensky,

"Sunderland, Mass.

"Box No. 105.

"Dear Sir:

"Your car of onions No. 9566 M. D. T. Co. arrived and was set at our house this morning. I notice by the bill of lading that it calls for 729 bushels of No. 1 onions and 94 bushels of No. 2 onions. This is not according to what we bought. We bought of you 400 bushels of extra onions and 200 bushels of No. 1s. We opened up the car and looked at them and find that the bags are not marked and that they do not run even weight. Some are bushels, some bushels and a peck and others two bushels, etc. You agreed to put these onions up the extras in two-bushel bags and the No. 1 in one bushel bags. We find that the best onions are good fair onions. We dumped out four small bags, probably holding about one bushel and picked out at least two bushels of small onions from them and we put them back into the bags and back into the car. We found one or two bags of small onions, what we would term in the fall of the year 'pickle' onions, little bits of things that would not run over 1 to 1 1-2 inches in diameter, if they did that. We cannot receive this car and have ordered it back to Somerville to the bulk track and shall notify the Boston & Maine R. R. that we shall not receive it, therefore, you will please make other disposal of it.

"Respectfully,

"Chapin Bros."

The bill of exceptions contained the following statement:

"There was no note or memorandum in writing of the bargain signed by the defendants or either of them or by any person authorized by them, unless the defendants' letters of Jan'y 25th and February 3d, 1906, constitute such."

At the close of the plaintiff's evidence the defendants suggested that the evidence showed a contract within the statute of frauds and that there was nothing for the jury, and requested the judge to direct the jury to return a verdict for

the defendants. The judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

The case was submitted on briefs at the sitting of the court in September, 1906, and afterwards was submitted on briefs to all the justices.

*W. A. Davenport*, for the plaintiff.

*C. R. Elder*, for the defendants.

BRALEY, J. Independently of R. L. c. 74, § 5, which makes unenforceable a contract for the sale of goods for \$50 or more where there is neither a memorandum in writing nor a partial payment of the price, unless the purchaser receives and accepts a part of the goods sold, it became a question of fact whether the onions which the plaintiff delivered corresponded in size and quality with those shown by the sample. *Townsend v. Hargraves*, 118 Mass. 325, 332. *McLean v. Richardson*, 127 Mass. 339. *Obery v. Lander*, 179 Mass. 125, 131.

But, if upon this issue the verdict might have been in his favor, as the statute of frauds had been pleaded, the plaintiff, before he could recover, was obliged to offer some evidence which tended to show an acceptance by the defendants. *Snow v. Warner*, 10 Met. 132, 137, 138. *Davis v. Eastman*, 1 Allen, 422. *Goddard v. Binney*, 115 Mass. 450, 456. *Safford v. McDonough*, 120 Mass. 290. His argument that this proof was unnecessary as the correspondence previous to delivery, when taken in connection with the shipping receipt, constituted a sufficient memorandum to satisfy the statute, fails, because these papers are silent as to the essential element of price. *Waterman v. Meigs*, 4 Cush. 497. *Smith v. Colby*, 136 Mass. 562.

By the terms of the sale, which for the purposes of these exceptions must be taken to be as stated by the plaintiff, although the delivery to the railroad company selected by them was a delivery to the defendants, yet as the carrier was authorized only to receive the onions for transportation there was no express or implied authority conferred to accept, and under such conditions mere delivery does not constitute an acceptance. *Johnson v. Cuttle*, 105 Mass. 447. *Atherton v. Newhall*, 123 Mass. 141. Compare *Strong v. Dodds*, 47 Vt. 348.

In *Remick v. Sandford*, 120 Mass. 309, 316, it is said: "If the

buyer accepts the goods as those which he purchased, he may afterwards reject them, if they are not what they were warranted to be, but the statute is satisfied." See also *Frostburg Mining Co. v. New England Glass Co.* 9 Cush. 115. If there was a transfer of possession not only to the carrier, but subsequently by the actual receipt of the car and its contents by the defendants at their place of business, this transfer cannot be treated as constituting an acceptance, which means an assent by the buyer as owner to take, in whole or in part, the merchandise delivered as being that for which he bargained. To determine this question the ordinary test is whether the conduct of the buyer in dealing with the goods is such as fairly to indicate an assertion of ownership, and where the sale is upon an express or implied warranty an examination at the time of delivery, and nothing more, is insufficient. *Remick v. Sandford*, *ubi supra*. Under the terms of sale the parties contemplated that at some period the defendants should have an opportunity to ascertain if in bulk the onions corresponded with those shown by the sample. Upon the arrival of the car this right was exercised, but the examination being for this specific purpose could not be deemed an act of acceptance. *Remick v. Sandford*, *ubi supra*. *Taylor v. Smith*, [1893] 2 Q. B. 65, 71. See also *Devine v. Warner*, 75 Conn. 375, 380; *Lloyd v. Wright*, 25 Ga. 215; *Jones v. Mechanics Bank*, 29 Md. 287; *Hewes v. Jordan*, 39 Md. 472; *Maxwell v. Brown*, 39 Maine, 98; *Edwards v. Grand Trunk Railway*, 48 Maine, 379, 381; *Smith v. Brennan*, 62 Mich. 349; *Fontaine v. Bush*, 40 Minn. 141; *Clark v. Labreche*, 63 N. H. 397; *Shindler v. Houston*, 1 Comst. 261, 269; *Stone v. Browning*, 51 N. Y. 211; *S. C.* 68 N. Y. 598; *Cooke v. Millard*, 65 N. Y. 352, 368; *Gibbs v. Benjamin*, 45 Vt. 124; *Hill v. McDonald*, 17 Wis. 97, 101; *Bacon v. Eccles*, 43 Wis. 227, 237; *Browne*, St. of Frauds, (5th ed.) § 316, *a-c*; *Benjamin, Sales*, § 214. After examination the defendants declined to accept, and immediately notified the plaintiff by letter stating their reasons, and while the jury could have found that in fact these reasons were unfounded, such a finding would have been inconclusive, as under the statute the buyer is at liberty to refuse, even if his action could be found to have been arbitrary and wholly unreasonable.

The defendants acted solely within their rights, even if all the

bags were opened for the purpose of inspecting the contents of each, as in no other satisfactory way could a comparison be made between the sample and the consignment received. Up to this point, therefore, there had been no assumption of ownership sufficient to satisfy the statute. *Knight v. Mann*, 118 Mass. 143. *Remick v. Sandford*, *ubi supra*. By directing the transfer of the car to the general yard of the railroad, after their notice to the plaintiff, they did not exercise any dominion as owners over its contents, as they were only taking the steps usually required to indicate positively that they declined to accept and that thereafter the onions were subject to the plaintiff's disposal. *Ather-ton v. Newhall*, *ubi supra*. *Dorr v. Fisher*, 1 Cush. 271. *Douglass Axe Manuf. Co. v. Gardner*, 10 Cush. 88, 90. *Cox v. Willey*, 183 Mass. 410, 412.

The case appears to be one of peculiar hardship to the plain-tiff, but as the unequivocal acts of the defendants are insufficient to show acceptance, a verdict in their favor was rightly ordered. *Remick v. Sandford*, 120 Mass. 309. *Knight v. Mann*, 118 Mass. 143. *Atherton v. Newhall*, 123 Mass. 141. *Denny v. Williams*, 5 Allen, 1. *Howard v. Borden*, 13 Allen, 299, 300. *Stone v. Browning*, 51 N. Y. 211; *S. C.* 68 N. Y. 598.

*Exceptions overruled.*

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## JOHN S. POMEROY vs. BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Essex. November 9, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Negligence. Street Railway. Carrier.*

In an action for personal injuries by a passenger against a street railway company operating cars on a road equipped by it with trolley poles, it is evidence of negligence on the part of the defendant that one of the poles is maintained upon a curve of its track at such an inclination toward the track that a passenger on the running board of an open car passing around the curve is in danger of coming in collision with it.

A passenger being transported by a common carrier has a right to assume that the carrier has adopted and maintains a reasonably safe mode of transportation.

In an action against a street railway company for personal injuries from coming

in contact with a trolley pole alleged to have been placed and maintained negligently by the defendant so near its track as to endanger passengers travelling upon its cars, the fact that the plaintiff before the accident was familiar with the place and knew the location of the poles, although important evidence on the question of his due care, is not conclusive upon the question whether he was negligent in leaving the back platform of an open car and stepping upon the running board in order to go to a seat, and thus coming in collision with a pole inclining too much toward the track.

In an action against a street railway company for personal injuries from coming in contact with a trolley pole alleged to have been placed and maintained negligently by the defendant so near its track as to endanger passengers travelling upon its cars, if there is evidence that the plaintiff, who was familiar with the locality, upon boarding an open car of the defendant, and seeing no vacant seat, took a position on the rear platform, when an acquaintance, who was seated, told him that room had been made for him, and he started to pass along the running board for the purpose of reaching the seat and was struck by the pole, the question whether the plaintiff was in the exercise of due care is for the jury.

TORT for personal injuries sustained while a passenger on an open car of the defendant, at about eight o'clock in the evening of August 9, 1903, on East Main Street in Gloucester, from coming in contact with a pole erected and maintained by the defendant alleged to have been negligently placed and maintained so near the track as to endanger passengers travelling upon the cars of the defendant. Writ dated December 7, 1903.

At the trial in the Superior Court before *Fox, J.* the plaintiff testified substantially as follows: "I took one of the defendant's cars at the foot of Hammond Street in East Gloucester to go to Gloucester; it was an eight wheel open car. When the car came along it stopped. I looked for a vacant seat, but did not see one. I noticed a lady up forward standing between the seats, and one or two passengers standing on the rear platform. I got on the rear platform. After the car started I saw Mr. Colby sitting ahead in the second seat from the rear. I had some business talk with him, and then leaned up against the rear dasher and took hold of that. Mr. Colby turned around to me and said 'Come in here and we will make room for you.' The people on the seat had to move over to make a seat for me. I started to take the seat, and got down on the right hand running board, and the post hit me, or I hit the post. I have no memory of that. It was a very rough road and the car would roll and pitch something like a boat. You had to hang on,

When I found I could get a seat I thought it was more comfortable and safer, and I went after the seat. The last thing I remember was going on the running board."

On cross-examination the plaintiff testified: "I had lived for some years within a quarter of a mile of the place of the accident, and was familiar with the locality. I had ridden by there frequently, and walked by there. My attention had never been called particularly to any of the poles along there. I knew there were posts on the side of the street all along there, but there had been nothing about their proximity to the track to attract my attention. I was standing in the middle of the back platform, right alongside the motor box. There were two other people there. I knew the track was on the right hand side of the street, and the poles were on the same side. I didn't see the pole before it hit me. I know nothing to prevent me walking along the left hand running board. I was looking towards the inside of the car when I was hurt. I got out on the running board and turned around to go into the seat. The conductor was up forward. The car didn't stop between the time I got on and the time I was hurt. At the place where I was hurt there is a very slight curve, not much of a curve. There is a slight bend in the general direction of the track. I never had occasion to notice either the poles or any trees along there in regard to their proximity to the track. I didn't know if one leaned out very far from the running board, one would be hit by poles along there. I never took notice of it. I had only got a step along the running board before I was hit. I didn't go along. I stepped down and when I got down there I got hit. It was just by the seat where the rod goes up to take hold of, between the two seats. I must have turned around looking into the car. I was not paying attention to anything which might be on that side of the track. During all the time that I had ridden or walked by that locality, it had never occurred to me that any of the poles along there were near the track. The pole is right in the edge of the curb stone. The pole was placed on the edge of the property, as far as I knew. I had frequently walked and ridden by there. The sidewalk was on the other side of the street. I could not say how far my head projected beyond the line of the running board when I was



struck. There was nothing very rushing there on teams. It is not a business centre of Gloucester."

At the close of the evidence, the defendant asked the judge to rule as follows:

1. On all the evidence your verdict must be for the defendant.
2. If the plaintiff stepped on the running board while the car was in motion, without sufficient reason for so doing, he cannot recover.
3. By voluntarily stepping on the running board while the car was in motion, the plaintiff assumed the risk of injury from contact with a pole, caused by his projecting his head unnecessarily beyond the line of the car.
4. One who leaves a place of safety on the rear platform of a street car and goes forward by the running board for the purpose of getting a seat, while the car is in motion knowing that the trolley poles are on that side, assumes the risk of injury from contact with one.
5. If the plaintiff could have seen the pole and avoided the accident had he been looking forward in the direction in which the car was going, he cannot recover.
6. If the plaintiff knew the poles were near the track on the right hand side of the car, and if he could have gone forward with reasonable safety by the left hand running board, he cannot recover.

The judge gave the second of these requests and refused to give any of the others. He instructed the jury that it was for them to say whether at the time of the accident the plaintiff was going forward to avoid danger or substantial inconvenience, and if so, whether that was a sufficient reason for his going forward in the manner in which he did.

The jury returned a verdict for the plaintiff in the sum of \$1,375; and the defendant alleged exceptions.

*R. G. Dodge*, (*S. H. E. Freund* with him,) for the defendant.  
*W. A. Pew, Jr.*, for the plaintiff.

**BRALEY, J.** The defendant, by accepting the plaintiff as a passenger, undertook to provide him with transportation to his place of destination, and in the performance of this duty it was required to exercise the highest degree of care commensurate with the nature of this undertaking. *Warren v. Fitchburg Rail-*

road, 8 Allen, 227, 233. *Galligan v. Old Colony Street Railway*, 182 Mass. 211, 214, 215. In the construction and equipment of its road the trolley poles were located at certain distances along the railway, and the alleged defect by which the plaintiff was injured consisted of a pole so placed on the circumference of a curve that its inclination towards the track jeopardized the safety of passengers while riding on or using the running board of open cars. It appears from the evidence that this pole was set in such a manner that at a point about eight feet from the surface of the ground by reason of the angle of inclination it was six inches nearer the track, and if taken in connection with the projection of the running board when rounding the curve such proximity could have been found by the jury to expose a passenger on the running board to the danger of coming into contact with it. In the use of closed cars this pole might not have rendered the road unsafe, yet as an open car was used a different question is presented. The transportation of passengers often includes the use by them of the running board by the invitation and with the permission of the carrier, and where this condition of travel appears then ordinarily as matter of law negligence cannot be inferred on the part of a passenger who stands thereon while in transit. *Moody v. Springfield Street Railway*, 182 Mass. 158. *Wilde v. Lynn & Boston Railroad*, 163 Mass. 533. *Mason v. Boston & Northern Street Railway*, 190 Mass. 255. The roadbed and its equipment were constructed and operated for the carrying of passengers under the usual conditions of public travel, and it was for the jury to determine whether in anticipation of such use of its car reasonable diligence called for a realignment of the pole to avoid the danger of possible collision, and whether its failure to take this precaution was negligence. See *Feital v. Middlesex Railroad*, 109 Mass. 398, 405; *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574, 579.

The further question whether the plaintiff was guilty of contributory negligence and assumed the risk also was an issue of fact. It certainly could not have been ruled as matter of law that from his previous knowledge of the location of the pole upon becoming a passenger he thus took the chance of defective construction or negligent maintenance of the instrumentalities used

for the motive power. Knowledge by a traveller of a defect in a public way over which he is passing, or is about to pass, of itself is not sufficient to preclude a recovery if when using this portion of the way he thereby receives an injury ; nor is a servant precluded who under similar conditions uses the ways provided by the master. The traveller in one case and the servant in the other have a right to rely upon the presumption that the public authorities, and the master, have performed their duty in providing a reasonably safe way. A passenger also may rely upon the presumption that a common carrier has adopted and maintains a reasonably safe mode of transportation. If an injury is suffered by either, his previous knowledge of unsafe conditions is important on the question of his negligence, but it is not conclusive. *Powers v. Boston*, 154 Mass. 60. *Torphy v. Fall River*, 188 Mass. 310. *Campbell v. Boston*, 189 Mass. 7. *Urquhart v. Smith & Anthony Co.* 192 Mass. 257, 262. Upon boarding the car and seeing no vacant seat he took a position on the rear platform, when an acquaintance, who was seated, having said that room had been made for him, he started to pass around on the running board for the purpose of reaching the seat when he was struck. The plaintiff had a right to rely upon the presumption that the defendant would not carelessly expose him to injury, and if his change of position was taken either to avoid the danger of riding on the platform, or to obtain a more comfortable position, and for this purpose he stepped temporarily on the running board in order to pass from one to the other, it was for the jury to determine, to whom the question was properly left, whether under the attendant circumstances his conduct was careless. *Moody v. Springfield Street Railway*, 182 Mass. 158, 160. *Mason v. Boston & Northern Street Railway*, *ubi supra*.

With the exception of the second which was given, the defendant's requests for rulings therefore were rightly refused, and the instructions given correctly stated the law.

*Exceptions overruled.*

CHARLES E. STUBBS vs. BOSTON AND NORTHERN STREET  
RAILWAY COMPANY.

Essex. November 9, 1903. — January 8, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

*Negligence. Street Railway. Practice, Civil, Exceptions.*

In an action against a street railway company for personal injuries from being thrown from the seat of a heavy covered wagon by a collision with a car of the defendant after dark on an afternoon in winter, where it appears that the top and sides of the wagon projected beyond the seat where the plaintiff was driving, so that to look back from the side of the wagon he would have to leave his seat and stand on a step, but that back of the seat there was an aisle with shelves and cupboards on each side running to a door at the rear containing a window through which the plaintiff by looking back could obtain an unobstructed view of the roadway, if the plaintiff testifies that he was driving at a slow trot on the right hand side of a single track railway of the defendant, and, having occasion to cross to the store of a customer on the left hand side of the street, he before turning looked and listened to ascertain whether a car was approaching, and believing the track to be clear turned diagonally across the track, that as he drove into the track he looked as much as he could considering his wagon and listened and heard nothing, and that just as the rear wheels cleared the track the wagon was struck by a car of the defendant approaching from behind, these statements of the plaintiff being somewhat modified but not substantially varied by the answers elicited in cross-examination, the question whether the plaintiff was in the exercise of due care is for the jury.

In an action against a street railway company for personal injuries from being thrown from the seat of a wagon by a collision with a car of the defendant after dark on an afternoon in winter, where it appears that the plaintiff was driving in a heavy covered wagon with a projecting top and sides at a slow trot on the right hand side of the track and turned diagonally across to the store of a customer on the left hand side of the street, when, just as the rear wheels cleared the track, the wagon was struck by a car of the defendant approaching from behind, if the defendant's motorman is not called as a witness, and there is evidence that the roadway at the point of the collision was lighted by an electric arc light, that the car was running on a straight track at a speed of not less than from ten to fifteen miles an hour, and as it approached the wagon, which from the platform of the car was plainly visible at the right of the track, the gong was not rung nor the speed slackened, there is evidence for the jury of negligence on the part of the defendant.

In an action against a street railway company for personal injuries from being thrown from the seat of a wagon by a collision with a car of the defendant, where it appeared that the plaintiff was driving in a heavy covered wagon with a projecting top and sides at a slow trot on the right hand side of the defendant's track and turned diagonally across to the store of a customer on the left hand

side of the street, when, just as the rear wheels cleared the track, the wagon was struck by a car of the defendant approaching from behind, the question of the plaintiff's due care was prominent throughout the trial. The defendant asked the judge to rule "that the plaintiff driving along outside the outer rail of the street railway would not be in the exercise of due care if, without taking reasonable precaution to find out whether the car was coming, he drove across the car tracks." The judge refused to give this instruction and the defendant excepted to the refusal and to a refusal to rule that the plaintiff was not entitled to recover. The bill of exceptions stated that the judge "submitted the case to the jury under instructions which were not otherwise excepted to except as above stated." *Held*, that this statement construed in the light of the request above quoted meant that full instructions were given to which no exceptions were taken; that if the request was intended to express a general proposition the judge was not called upon to follow the words used but was at liberty to instruct the jury in such language as he deemed proper, or, if the request related to a particular portion of the testimony the judge was not required to single out any particular feature of the plaintiff's conduct for the consideration of the jury as conclusive upon the question of his due care; so that in either case there was no ground for exception.

TORT for personal injuries from being thrown from the seat of a heavy covered wagon by a collision with a car of the defendant after dark on the afternoon of January 19, 1903, at about twenty minutes past five o'clock, as the plaintiff was driving across a single track railway of the defendant on Main Street in that part of Haverhill called Bradford. Writ dated April 29, 1903.

In the Superior Court the case was tried before *Fox*, J. At the close of the evidence the defendant asked the judge to instruct the jury as follows:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. That the plaintiff driving along outside the outer rail of the street railway would not be in the exercise of due care if, without taking reasonable precaution to find out whether the car was coming, he drove across the car tracks.

The judge "refused to give these instructions and the defendant duly excepted to each refusal."

The judge "submitted the case to the jury under instructions which were not otherwise objected to except as above stated."

The jury returned a verdict for the plaintiff in the sum of \$745; and the defendant alleged exceptions.

*L. S. Cox*, for the defendant.

*H. J. Cole*, for the plaintiff.

*BRALEY, J.* The defendant's first request was rightly refused.

In the common use of the highway the parties were under the reciprocal obligation to exercise due care, and the entire width of the way, including the portion occupied by the defendant's track, so far as it had been wrought for public travel, was lawfully open to the use of the plaintiff. *O'Brien v. Blue Hill Street Railway*, 186 Mass. 446.

At the time of the accident the plaintiff was driving a heavy wagon, which was covered in such a manner that the top with the projecting sides formed a hood inside and immediately back of which was the driver's seat, where the plaintiff was seated. In the space back of this seat were shelves and cupboards on each side with an alley way between running to the rear where a door containing a window was placed, and by looking down the aisle the driver could obtain an unobstructed view of the roadway. If for this purpose instead of looking through the window he attempted to look back from the side of the wagon he would be required to leave his seat and stand on a step. Upon the direct testimony of the plaintiff the jury could find that while driving at a slow trot on the right hand side of the track at the place where the collision took place he turned diagonally across to the store of a customer on the left hand side of the street, and that before turning he looked and listened to ascertain whether a car was approaching, and believing the track to be clear drove over, when just as the rear wheels cleared the track the wagon was struck by the defendant's car. It also was for them to decide how far his evidence given in direct examination "that as he drove into the track he looked as much as he could, considering his wagon, and listened and heard nothing and crossed over and drove out of the track" was modified by the cross-examination. If the defendant is given the benefit of any discrepancies between these statements, and the plaintiff's case as to his due care is left solely upon the answers elicited in cross-examination, still it could have been found that he was not in fault. It then would appear that the plaintiff leaned out of the side of the wagon and looked to the left as far as he conveniently could, and not seeing or hearing the car approaching, kept on over the track. They further could find that, although the wagon was heavy, the horses had come to a walk, and the noise of the team was not sufficient to prevent him from hearing the approach of

the car. Upon finding a clear road, and neither hearing nor seeing a car coming, and relying on the presumption that the defendant would refrain from negligence, it cannot be said as matter of law that in the ordinary use of a public way under such circumstances the plaintiff was negligent in driving over the track. In *Seele v. Boston & Northern Street Railway*, 187 Mass. 248, which the defendant contends governs this case, the plaintiff, driving in a covered wagon, had driven for a long distance close to the outer rail of the track when without taking any precaution to ascertain whether a car was coming in his rear he deliberately turned and drove over. In the present case the plaintiff, if believed, could have been found to have acted with reasonable prudence, and the case on this issue is within *Karrigan v. West End Street Railway*, 158 Mass. 305; *Robbins v. Springfield Street Railway*, 165 Mass. 30; *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104; *Finnick v. Boston & Northern Street Railway*, 190 Mass. 382; *Williamson v. Old Colony Street Railway*, 191 Mass. 144; *Driscoll v. West End Street Railway*, 159 Mass. 142; *Galbraith v. West End Street Railway*, 165 Mass. 572; and *White v. Worcester Consolidated Street Railway*, 167 Mass. 43. See *Hennessey v. Taylor*, 189 Mass. 583. The testimony relating to the conduct of the defendant's motor-man, who was not called as a witness, required the submission of the issue of the defendant's negligence to the jury. It appeared from the evidence of a witness called by the plaintiff that the roadway at the point of the collision was lighted by an electric arc light, and although denied by the conductor and another witness called by the defendant, that the car was running on a straight track at a speed of not less than ten to fifteen miles an hour, at the time, and as it approached the wagon, which in its progress along the side of the track was plainly visible from the platform of the car, the gong was not rung nor the speed slackened. *Williamson v. Old Colony Street Railway*, *ubi supra*.

The remaining exception is to the refusal to give the defendant's second request. It is plain from the recitals in the exceptions that throughout the trial the question of the plaintiff's due care was prominent, and no instructions to the jury would have been adequate unless their attention was appropriately directed to this issue. That such a course was taken appears

from the statement that "the presiding justice submitted the case to the jury under instructions which were not otherwise objected to except as above stated." When construed with the request this means that full instructions were given to which no exception was taken, as the only specific exception was to the refusal to rule as requested, not to the rulings given, or of a failure to give any instruction that the burden was on the plaintiff to show that he was using due care. *Corrigan v. Connecticut Ins. Co.* 122 Mass. 298, 300. *Urquhart v. Smith & Anthony Co.* 192 Mass. 257, 268. If the second request was intended to express this general proposition, the presiding judge was not called upon to follow the words used, but was at liberty to instruct in such language as he deemed proper. *Graham v. Middleby*, 185 Mass. 349, 354. If the request was predicated upon the defendant's contention that the plaintiff should have stopped his team, and looked back before attempting to cross the track, and that merely to look from the side of the wagon and listen for an oncoming car from this position was insufficient, then the judge was not required to single out any particular feature of the plaintiff's conduct as being specially conclusive of his negligence, but it was for the jury to say whether upon his uncontroverted testimony, under the conditions shown he used ordinary prudence. *Shattuck v. Eldredge*, 173 Mass. 165, 168, and cases there cited. *Ellis v. Lynn & Boston Railroad*, 160 Mass. 341, 351. *Tashjian v. Worcester Consolidated Street Railway*, 177 Mass. 75, 80. *Kerr v. Boston Elevated Railway*, 188 Mass. 434, 436. *Pierce v. O'Brien*, 189 Mass. 58, 61.

*Exceptions overruled.*



## DENNIS W. SULLIVAN &amp; another vs. CHARLES S. FUGAZZI.

Suffolk. November 15, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, &amp; SHELDON, JJ.

*Practice, Civil, Conduct of trial, Exceptions. Sale.*

Where by an order of court an action by a buyer of goods against the seller for the non-delivery of and delay in delivering the goods is tried together with an action by the same plaintiff against the railroad company by which the goods were transported, and the seller testifies as a witness in his own behalf, after he has been cross-examined by the plaintiff, the presiding judge in his discretion, against the objection of the witness, may allow the railroad company to cross-examine him in its own interest; and to such exercise of discretion no exception lies, especially where the testimony elicited is not reported and the excepting party fails to show that he has been injured by the ruling.

In an action by a buyer of goods in transit, which the seller undertook to transfer by the indorsement and delivery of the bills of lading, against the seller for non-delivery of the goods, where the plaintiff contends that the defendant, either undertook to deliver the goods absolutely, or, if he merely agreed to transfer the bills of lading properly and to give the necessary orders to the carrier, he had failed to give such necessary orders, the presiding judge properly may refuse to give instructions to the jury as to the duties of a common carrier of freight in regard to delivery which, however correct they may be as abstract propositions of law, are inapplicable to the case.

CONTRACT, the first count for \$770 for money had and received, the second count for \$275 damages for the non-delivery of a car load of peaches for which the plaintiff had paid the defendant \$770, the third count for \$252 damages for delay in the delivery of and consequent damage to another car load of peaches for which the plaintiff had paid the defendant, and the fourth count for \$1,297 on an account annexed, combining the claims set forth in the first three counts. Writ in the Municipal Court of the City of Boston dated September 23, 1902.

On appeal to the Superior Court the case was tried before *Stevens, J.* together with another case between the same plaintiffs and the New York, New Haven and Hartford Railroad Company as defendant. The following facts appeared in evidence: The plaintiffs were dealers in fruit, doing business under the name of George H. Chessman and Company in Boston. The defendant was a peach grower having plantations in various

parts of the South. The plaintiffs' agent, Charles J. Milligan, in the summer of 1903, met the defendant in Plainville, Georgia, and bought from him two car loads of peaches. Both car loads were then in transit. The first car load originally had been consigned to Winn, Ricker and Company at Boston, but had been diverted to the defendant at Springfield. The second car load was consigned directly to the defendant at Boston. The first car load never was delivered to the plaintiffs, and the second was received by them only after considerable delay.

Testimony regarding the sale was given both by the plaintiffs' agent Milligan and by the defendant. The plaintiffs' contention at the trial was that the defendant agreed to deliver the two car loads of peaches to the plaintiffs in Boston and guaranteed that there should be such delivery, while the defendant's contention was that he agreed to do only what ordinarily was necessary for the purpose of diverting the cars so that the railroad company should deliver them to the plaintiffs, and that he did in fact do what ordinarily was necessary. The case was left to the jury to determine whether the contract was as contended by the plaintiffs, or, in case the contract was as contended by the defendant, whether the defendant had failed to exercise the ordinary diligence which he had agreed to use.

At the trial of the case, after the plaintiff had rested, it was agreed that the defendant Fugazzi should put in his case first, and that the defendant the New York, New Haven and Hartford Railroad Company should put in its case after the defendant Fugazzi had rested. The defendant Fugazzi was called as a witness for himself in the case against him, and, after his direct examination by his attorney, was cross-examined by the attorney for the plaintiff. Then the attorney for the New York, New Haven and Hartford Railroad Company, the defendant in the other case, started to cross-examine the defendant Fugazzi in the interest of its own case. The judge allowed this procedure, against the objection and exception of the defendant Fugazzi.

The defendant made twenty-one requests for rulings, of which the following only are material, the others either having been given in form or in substance by the judge, or the exceptions to their refusal having been waived:

No. 8. It is the carrier's duty primarily to deliver to the owner of the goods, or the party entitled to receive them, and since the property in and title to the goods go with a transfer of the bill of lading where one has been issued, delivery must be made to the holder of the bill, and the carrier is liable for a delivery of the bill, although he may be the consignee.

No. 9. If the jury find that the defendant properly indorsed both bills of lading to the plaintiff and therefore delivered those bills of lading to the agent at Plainville, Georgia, the plaintiff cannot recover.

No. 14. The carrier's duty to deliver to the proper party is absolute, and nothing will excuse a delivery to any other party.

No. 16. Bills of lading are always transferable so as to place the title to the goods in transit, and this is as effectual as if the goods themselves were delivered to the consignee.

No. 17. When property properly packed is sent on its way from one common carrier, and in order to reach its destination must be sent through other common carriers, the last carrier is liable for any injury which may result to the property.

No. 18. If a common carrier, receiving goods at the destination billed by the shipper, under any circumstances delivers the goods to the wrong party, the common carrier is liable for conversion of the goods.

The above rulings were refused by the judge.

The jury returned a verdict for the plaintiffs in the sum of \$1,137.40; and the defendant alleged exceptions.

C. W. Ford, (E. M. Schwarzenberg with him,) for the defendant.

A. Lincoln, for the plaintiffs.

BRALEY, J. The plaintiffs' cause of action, whether against the defendant, or the railroad company, was for a failure to deliver the peaches either according to the contract of sale or of carriage, and the order that the actions should be tried together rather than separately was not only proper but discretionary with the trial court. *Springfield v. Sleeper*, 115 Mass. 587. *Burt v. Wigglesworth*, 117 Mass. 302. *Commonwealth v. Robinson*, 1 Gray, 555. *Commonwealth v. Miller*, 150 Mass. 69. *Commonwealth v. Bingham*, 158 Mass. 169. Within the scope of

such an order is the probability that if one of the parties in the usual order of proof is called as a witness in either case he may give testimony affecting the issues in the other. It does not appear that counsel for the company claimed an absolute right to examine the defendant as an adverse party, for from the language of the exceptions we assume that the cross-examination was permissive. It is impossible to reproduce upon a printed record however perfect the importance of the effect at a jury trial of the shifting aspects of evidence, and the appearance of witnesses. If the defendant had been called by the company as a witness, and had appeared adverse he could have been cross-examined, and, although called in his own favor, the presiding judge upon finding that the company was affected by his evidence may have deemed it expedient to allow such an examination, but, whatever the reason may have been, the orderly conduct of the trial was within his discretion, and the testimony elicited not being reported the defendant fails to show that he has been injured by the ruling. *Beal v. Nichols*, 2 Gray, 262. *Jennings v. Rooney*, 188 Mass. 577, 579. *Commonwealth v. Johnson*, 188 Mass. 382, 385. *Lee v. Tarplin*, 183 Mass. 52, 54.

The exceptions to the exclusion of evidence and to the instructions to the jury, not having been argued, require no comment, and there remain the exceptions to the requests for rulings so far as they were not given. But of these only the eighth, ninth, fourteenth, sixteenth, seventeenth and eighteenth are now urged. In dealing with them an embarrassment arises because the bill of exceptions does not purport to contain all the evidence, but it is plain that the principal issue was to ascertain the contract between the parties, the terms of which appear to have depended wholly upon the conflicting testimony of the plaintiffs' buyer, and of the defendant. Upon either view the jury were correctly instructed that if the agreement as alleged by the plaintiffs was proved they would be entitled to recover if there had been a breach by a failure to deliver at Boston, or, if this agreement had not been proved, then, if the contract was, as the defendant contended, only to indorse properly the bills of lading, and give the necessary orders to the carrier that the cars should be sent to Boston con-

signed to the plaintiffs, the defendant would not be liable in damages unless he negligently failed to take such steps as ordinarily would be necessary to accomplish such change and delivery and by reason of his negligence the peaches were finally miscarried. All of the requests refused relate to the duties of a common carrier of freight, and, if correct as abstract propositions of law, they were inapplicable, as the plaintiffs' right to recover did not rest upon the fact that the carrier delivered to a stranger, but on the ground that the defendant either undertook to deliver absolutely, or that upon making a sale of goods in transit consigned to himself, he failed to give definite orders to enable the carrier to deliver to the plaintiffs. *Milk v. Middlesex Railroad*, 99 Mass. 167, 169. *Wilson v. Lawrence*, 139 Mass. 318. *Snow v. Terrett*, 167 Mass. 457.

*Exceptions overruled.*



SIDNEY CHASE & others vs. CITY OF BOSTON.

Suffolk. November 15, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Tax. Pledge. Broker.*

Where a broker buys shares of stocks upon orders in writing from his separate customers with a specific agreement with each customer that the ownership shall be in the customer subject to a lien of the broker for any indebtedness to him, each order directing the broker to buy a certain number of shares of specified stocks for the account and risk of the purchaser, and the broker makes the purchases as directed and notifies each customer of the purchase and the price paid, and the customers make part payments to the broker, usually of about forty per cent of the price, and the certificates for the purchased shares with blank transfers signed by the former owners named therein are left with the broker as security for the balance of the price due from each customer to the broker, the broker being expressly authorized by the customer to pledge the shares for loans to himself, and the broker does this as his convenience demands, but the certificates of stock bought for and belonging to each customer are kept apart in a separate envelope, whether pledged or not, the broker holds the shares as a pledgee with the right to repledge them to others, and they are not taxable to him but are taxable to the customers who are the owners and pledgors.

St. 1903, c. 423, § 1, relating to the transfer of shares in corporations by delivery of the certificates signed in blank, now contained in St. 1903, c. 437, § 28, does

not operate to make the pledgee of such shares the absolute owner, and where certificates thus signed in blank are delivered as security under a contract of pledge the shares are taxable to the pledgor.

R. L. c. 12, § 26, providing that "personal property mortgaged or pledged shall for the purpose of taxation be deemed the property of the party in possession thereof on the first day of May," refers only to tangible property, and does not apply to a pledge of shares of stock in a corporation.

Under R. L. c. 12, § 46, if a taxpayer has brought in a sworn list of assessable property in accordance with the requirements of the preceding sections of that statute and has not refused to answer on oath any necessary inquiries of the assessors as to the nature and amount of his property, the assessors must receive the list as true, and lawfully cannot refuse to abate a tax on the ground that the list should have contained property not included in it.

PETITION, filed in the Superior Court on April 11, 1906, to abate a tax assessed upon the petitioners on May 1, 1905.

The case was referred to Henry W. Bragg, Esquire, as commissioner, who filed a report. It appeared from the report that the petitioners on May 1, 1905, were stockbrokers doing business in Boston under the firm name of Chase and Barstow, with a cash capital of \$60,000, on which it was admitted that they were taxable.

The purchases of securities made by them as brokers were made on orders in writing signed by the persons for whom the purchases were made, upon the following form :

" Boston, 190

" Chase & Barstow,

" Buy

" Buy, for my account and risk,

This order good till

" Signature

" Address

"

An agreement was made between the petitioners and each customer as follows :

" It is agreed that Chase & Barstow have the right to pledge for loans made to them any securities delivered to them by me as collateral security or bought by them on my order ; but the ownership of such securities as are delivered by me to them as collateral security shall continue in me, and the ownership of all securities bought by them on my order shall be mine on their

purchase, and continue in me, only subject to a lien of Chase & Barstow thereon to secure my indebtedness to them."

The petitioners kept each customer's stock separate.

The assessors rejected the statement filed by the petitioners, and doomed them on a valuation of \$300,000. It further appeared that the petitioners had in their possession on the first day of May stocks in corporations which were taxable of the estimated value of \$617,154, which they held under the foregoing agreements and which they had not pledged.

The case was heard by *Pierce, J.* upon the petition and answer, the commissioner's report and the facts found and stated therein. The judge found and ruled thereon that the petitioners should have been assessed a tax upon \$60,500 shown by their list returned to the assessors, and not a tax upon \$300,000 as doomed by the assessors, and that the petitioners were entitled to be allowed an abatement of \$3,832, with interest thereon from November 1, 1905. He ordered judgment for the petitioners in the sum of \$3,832, with interest thereon from November 1, 1905.

To this finding, ruling and order the defendant excepted, and at the request of the parties the judge reported the case for determination by this court.

*J. H. Benton, Jr.*, for the petitioners.

*S. M. Child*, for the respondent.

SHELDON, J. If the stocks bought and held by the petitioners for their customers had been bought upon a margin in the ordinary significance of that word, the legal title to them would have been in the petitioners, who in that event properly would have been taxed for their value, and the petition could not have been maintained. *Chase v. Boston*, 180 Mass. 458. But that is not the case. All of these stocks were bought by the petitioners upon written orders from their customers, with a specific agreement that the ownership should be in the customers, subject only to a lien in favor of the petitioners for any indebtedness to them. Each of these orders directed the petitioners to buy a certain number of shares of specified stocks for the account and risk of the purchaser. If the petitioners made the purchase, they notified the customer of the price paid therefor, and he would pay either the whole or some

part of that price. In the first event, he received his stock certificate, made out either in his own name or in the name of some former owner but with blank transfers upon the back signed by such former owner. In the latter event, the balance of the price, usually about sixty per cent thereof, was lent to him by the petitioners, and the certificates, with blank transfers properly signed by the owner named therein, were left with the petitioners as security for the indebtedness thus created. The petitioners were authorized by the customer to pledge for loans to themselves these securities or any securities left with them as collateral security; and they did so as their own convenience demanded. But the certificates of stock bought for and belonging to each customer were kept apart from all others, in separate envelopes, whether pledged or not; and the petitioners made such arrangements with their pledgees as to be able always to give to each customer his own specific stocks upon his paying the balance due for the price thereof.

Manifestly upon these facts, if there were nothing more, it would appear that the petitioners held these stocks as pledgees, with the right to repledge them to others, and that the purchasers were the owners and pledgors. They were bound to keep, as it is found that they did keep, the stock of each customer distinct; they could not take a single certificate in their own name for all the similar stock purchased for all their customers; and they were bound to deliver, as they were accustomed to deliver, to each customer the identical stock purchased for him. It would follow that not the petitioners, but the rightful owners respectively of these stocks should be taxed for them, that the petitioners were entitled to the abatement which they seek, and that the judgment of the Superior Court should be affirmed.

It is contended however for the respondent that the effect of St. 1903, c. 423, § 1, is to make the petitioners the general owners of the stocks in question, and so liable to taxation upon them. That statute provides that "the delivery of a certificate of stock by the person named as the stockholder in such certificate or by a person entrusted by him with its possession for any purpose to a *bona fide* purchaser or pledgee for value, with a written transfer thereof, or with a written power of attorney to



sell, assign or transfer the same, signed by the person named as the stockholder in such certificate, shall be a sufficient delivery to transfer title as against all persons; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact until it has been recorded upon the books of the corporation, or until a new certificate has been issued to the person to whom it has been so transferred. Such purchaser, upon delivery of the former certificate to the treasurer of the corporation, shall be entitled to receive a new certificate. Stock shall not be transferred upon the books of the corporation if any instalments thereon remain overdue and unpaid. A pledgee of stock transferred as collateral security shall be entitled to a new certificate if the instrument of transfer substantially describes the debt or duty which is intended to be secured thereby. Such new certificate shall express on its face that it is held as collateral security, and the name of the pledgor shall be stated thereon, who alone shall be liable as a stockholder, and entitled to vote thereon." These provisions are now contained in St. 1903, c. 437, § 28. See also St. 1906, c. 463, Part II, § 41, and Part III, § 22.

But the object of this statute was merely to protect stock so transferred against attachments or other accruing claims against the apparent owner of record. It was not intended and cannot operate to raise the title of a pledgee into an absolute ownership. Nor was it designed to throw the burden of taxation upon the pledgee and to exonerate therefrom the general owner, even though the transfer was not upon its face expressed to be by way of security only. Manifestly an owner of stock could not escape his liability to be taxed therefor by merely pledging it to a creditor; manifestly he could not withdraw it wholly from the fund available for taxation in this Commonwealth by transferring it in blank and delivering the certificates in pledge to a foreign creditor who was beyond the reach of any of our local assessors. Such property is to be taxed to the pledgor, not to the pledgee. The latter does not escape taxation, for by our statutes he is to be taxed for the debts which are secured by the pledge, though entitled to an allowance for such debts as may be due from himself. R. L. c. 12, § 4, cl. 2. The provisions of

§ 26 of this chapter refer to tangible property, not to mere intangible entities like titles to corporate stocks. *Waltham Bank v. Waltham*, 10 Met. 334, 338. *Hall v. County Commissioners*, 10 Allen, 100, 101. The St. of 1903, c. 423, was not passed with the purpose of repealing the rule of these decisions; it was designed wholly *alio intuitu*, to regulate the rights of holders of stocks among themselves.

Accordingly we are of opinion that the petitioners were not liable to taxation upon the value of these stocks, and are entitled to the abatement which they claim.

Even if the main contention of the respondent were correct, however, it is at least difficult to see how the act of the assessors in rejecting the petitioners' sworn statement and "dooming" them in the arbitrary sum of \$300,000 could be upheld. The list of copartnership property contained in this statement was made up in accordance with the requirements of R. L. c. 12, §§ 42 *et seq.* It is provided by § 46 of this chapter that the assessors "shall receive as true, except as to valuation, the list brought in by each person, unless, on being thereto required by the assessors, he refuses to answer on oath all necessary inquiries as to the nature and amount of his property." It is found that the petitioners made no such refusal, and it did not appear from their examination that the list was not a true one. *Hall v. County Commissioners*, 10 Allen, 100. Apart from the fact that this list is now found to have been correct, it therefore seems to have been conclusive upon the assessors, as they did not choose to require any further answers upon oath from the petitioners. *Moors v. Street Commissioners*, 134 Mass. 431. *Lincoln v. Worcester*, 8 Cush. 55, 64. *Newburyport v. County Commissioners*, 12 Met. 211, 223. We have preferred, however, to rest our conclusion upon the first and principal question in dispute, understanding this to be the desire of both parties.

In accordance with the terms of the report, the judgment of the Superior Court is to be

*Affirmed.*

**KATIE KENNEDY vs. ANGUS McLELLAN.****Suffolk. November 20, 1906. — January 3, 1907.****Present: KNOWLTON, C. J., HAMMOND, LORING, BRALRY, & SHELDON, JJ.***Practice, Civil, Abatement, Appeal. Statute. Bastardy. Superior Court. Jurisdiction.*

While the exception to the right of appeal from a judgment of the Superior Court to this court contained in R. L. c. 178, § 96, which was repealed by St. 1906, c. 342, § 2, was in force, a judgment on an answer in abatement was final although the defence set up in it was one of substance relating to the jurisdiction of the court.

Under the exception to the right of appeal from a judgment of the Superior Court to this court contained in R. L. c. 178, § 96, which was repealed by St. 1906, c. 342, § 2, where a defendant in answer to a complaint in bastardy process under R. L. c. 82, pleaded, in a so called plea of abatement, to the jurisdiction of the court, and moved that the complaint be abated because it did not allege that he either lived or had his usual place of business within the judicial district of the court or in the county in which the complaint was made, it was *held*, that, even assuming that the plea in abatement, although so entitled, could be treated as a motion to dismiss, yet as such a motion it should be denied, as in cases under R. L. c. 82 it is the Superior Court which has jurisdiction, and the proceedings in the police, district or municipal court are merely initiatory, so that it is sufficient if the process is brought to a hearing in the county or judicial district in which either the complainant or the defendant resides.

A complaint in bastardy process under R. L. c. 82 may be brought in the county where either of the parties lives.

SHELDON, J. This is a complaint brought under R. L. c. 82, in the Municipal Court of the Dorchester District of the City of Boston. It appears by the allegations of the complaint that the complainant was a resident of that district and the defendant was a resident of Milton in the county of Norfolk. The defendant seasonably filed in that court a so called plea in abatement, in which he said that he pleaded to the jurisdiction of the court and moved that the complaint be abated because it did not allege that he either lived or had his usual place of business within the judicial district of that court or in the county in which the complaint was made, and because he did not live or have his usual place of business within said district or county. This plea was overruled, and he was held to appear at the Superior Court, under R. L. c. 82, § 9. In that court he renewed his former plea; it was overruled, and he was found guilty by

the jury; and the case now comes before us on his appeal from the order overruling his plea in abatement.

The first question to be considered is whether the appeal is rightly before us under the provision of R. L. c. 173, § 96, excepting a judgment upon an answer in abatement from the general permission given to any party aggrieved by a judgment of the Superior Court to appeal to this court. This exception, though now repealed by St. 1906, c. 342, § 2, was in force at the time that this appeal was taken. If the defendant's plea were to be regarded as strictly an answer in abatement, we cannot doubt that the order of the Superior Court made thereon would be final. *Young v. Providence & Stonington Steamship Co.* 150 Mass. 550. *Willard v. Stone*, 13 Gray, 475. *Morey v. Whittenton Mills*, 8 Cush. 874. *Guild v. Bonnemort*, 156 Mass. 522. This would make it necessary to dismiss the defendant's appeal.

Assuming however that this plea in abatement, though entitled as such, should yet, at least so far as the first cause therein assigned is concerned, be treated as a motion to dismiss, (as to which see *Young v. Providence & Stonington Steamship Co.* 150 Mass. 550, 554,) yet the contention of the defendant cannot be sustained. It is the Superior Court that has jurisdiction in these cases; the proceedings in the police, district or municipal court are merely initiatory; and it is quite sufficient if such a suit is brought to a hearing in the county or judicial district in which either the complainant or the defendant resides. *Garlick v. Bartlett*, 4 Allen, 365. *Williams v. Campbell*, 3 Met. 209, 211. *Gallary v. Holland*, 15 Gray, 50. The language of R. L. c. 82, §§ 2, 3, clearly leads to the same conclusion. Indeed, in the opinion of the court in *Williams v. Campbell*, *ubi supra*, it is expressly stated that these suits come within the statute "which provides that 'all transitory actions, between parties who both live within the State, shall, except in cases in which it is otherwise provided, be brought in the county where one of the parties lives.'" This provision, with some changes immaterial to this case, is now contained in R. L. c. 167, § 1.

The decree of the Superior Court must be affirmed.

*So ordered.*

*E. W. Brewer & H. H. Pratt*, for the defendant.

*J. R. McVey & E. M. Shanley*, for the plaintiff.

**WILLIAM O. PARTRIDGE vs. INHABITANTS OF ARLINGTON.**

Middlesex. November 22, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Practice, Civil, Exceptions, Amendment. Superior Court. Jurisdiction. Damages.*

Although, where a judge of the Superior Court has authority to allow an amendment, no exception lies to the exercise of his discretion, an exception lies to the allowance of an amendment beyond the jurisdiction of the court.

The Superior Court has no power to allow an amendment to a petition for damages under a statute adding a separate claim which is barred by the limitation of the statute.

The Superior Court has no power to allow an amendment to a petition under Pub. Sts. c. 52, §§ 15, 16, for damages from a change of grade in a highway, which undertakes to add as a petitioner the wife of the original petitioner, asserting a claim for damages to one of the lots of land described in the original petition belonging to the wife of the petitioner in her own right for which she failed to file a petition within one year from the completion of the work, as required by § 15, or to file within a period of five or six years any petition to the Superior Court under § 16 to have her damages ascertained by a jury.

PETITION, filed on or about September 8, 1898, under Pub. Sts. c. 52, § 15, with the selectmen of the town of Arlington, by William O. Partridge as the "owner of a certain estate on Claremont Avenue" in Arlington, praying the selectmen to determine his damages by reason of a change of grade in that avenue made in the years 1897 and 1898.

Hearings were had on the petition, and a final adjudication was made thereon by the selectmen on December 3, 1898, when the selectmen voted as follows: "That the petitioner has sustained no damage by any acts done by the board of selectmen of the town or by its authority in changing the grade of said Claremont Avenue over and above the benefit received by him by reason of such change of grade and such other acts done by the authority of said board."

Thereafter on August 7, 1899, the petitioner William O. Partridge applied by petition to the Superior Court under § 16 of the same statute to have his damages estimated and assessed by a jury in the present proceeding. The respondent filed an answer to this petition.

From August 7, 1899, to the present time the petition has been pending in that court. At the time of filing his petition with the selectmen, and also at the time of filing his petition in the Superior Court, the petitioner William O. Partridge owned two lots of land on Claremont Avenue not adjoining each other, and his wife, Isabella C. Partridge, owned the lot with the buildings thereon situated between these two lots.

In the petition of William O. Partridge to the Superior Court, the petitioner alleged that the record title of the last named lot, being the lot second described in that petition, stood in the name of Isabella C. Partridge.

Isabella C. Partridge has never at any time filed any petition with the selectmen under the Pub. Sts. c. 52, § 15, or otherwise for compensation for any damage sustained by her by reason of the matters and things set forth in the petitions or either of them, or by reason of any other act of the town of Arlington or its officers or agents, or for the determination of such compensation, although all the raising, lowering or other acts done for the purpose of repairing the way were done and fully completed before September 8, 1898.

She never applied to the Superior Court by petition or otherwise except to file a motion on January 16, 1904, to be admitted as a party petitioner in this proceeding.

A hearing was had in the Superior Court on this motion on February 12, 1904, before *Gaskill*, J. The respondent asked the judge to rule as a matter of law that Isabella C. Partridge could not be admitted as a party petitioner and to overrule her motion. The judge refused so to rule and allowed the motion against the objection of the respondent. The jury found for the petitioners in the sum of \$250, assessing damages on one of the lots at \$225 and on the other lot at \$25. The respondent alleged exceptions to the allowance of the motion and to the refusal of the judge to rule as requested.

*H. D. Hardy*, for the respondent.

*G. P. Wardner*, for the petitioner.

**SHELDON, J.** The only question presented by these exceptions is whether the Superior Court could rightfully allow Mrs. Partridge's motion that she should be admitted as a party petitioner. If the court had such power, no exception to its

decision would lie. *Payson v. Macomber*, 3 Allen, 69, 70. But if the court had no authority to allow the amendment as a matter of discretion, then the defendant could take advantage of the error by exception. *Peterson v. Waltham*, 150 Mass. 564. Nor do we think it material to consider at present what would be the effect of the amendment if the court had jurisdiction to hear her case. If Mrs. Partridge, after having been admitted as a petitioner, was entitled to have her case heard, even though she had not the right to maintain her petition either because she had failed to make any claim before the selectmen or because she had not seasonably begun her proceedings, this question would properly be considered at the trial, and the rights of each party could then be fully protected, as in *Smith v. Butler*, 176 Mass. 38. If, however, the effect of the amendment itself would be to oust the court of its jurisdiction over the subject matter of the petition, then we are bound by the previous decisions of this court to say that the court had no power to allow the amendment. This was the very point of the decision in *Peterson v. Waltham*, 150 Mass. 564. It was held in that case that the court had no power to allow an amendment changing an action of tort to recover damages for the taking of the plaintiff's land and laying out streets over it into a petition for the recovery of damages under the statute, after the expiration of the time within which the statute allowed such a petition to be filed; and the decision was rested upon the ground that if the amendment could be regarded as changing the declaration into a petition from the time it was filed, or as changing the writ into a petition from the time it was issued, the effect would be to show that the court had no jurisdiction, and that there were no legal proceedings before it. To the same effect is *Lancy v. Boston*, 185 Mass. 219, in which Lathrop, J. says, as the basis of the decision, that where a statute limits the time in which a petition for damages must be brought, the court has no jurisdiction to entertain a petition brought after that time has expired. And see the cases there cited.

In the case at bar, the only remedy for the recovery of the damages claimed in the petition was that given by Pub. Sta. c. 52, §§ 15, 16. Before the enactment of the statute of which these sections are a revision, these damages could not have been

recovered at all. *Callender v. Marsh*, 1 Pick. 418. And it is settled that the new right thus given can be enforced only in the manner provided by the statute. *Sullivan v. Fall River*, 144 Mass. 579, 585. *Hull v. Westfield*, 183 Mass. 433. This was assumed in *Proctor v. Stone*, 158 Mass. 564, and *Garrity v. Boston*, 161 Mass. 530. In the case of a town, this remedy was to file a petition with the selectmen within a year after the completion of the work, for compensation for whatever damages had been sustained; and if the petitioner was aggrieved by the determination of the selectmen or by their neglect or failure to act upon such a petition within thirty days, he might, by a petition filed within the further period of one year, have his damages assessed by a jury. Mrs. Partridge had taken neither of these steps when she filed her motion, although the time therefor had much more than expired. No doubt the defendant might have waived the objection that there had been no determination of her damages by the selectmen, and perhaps might have been held to have done so if it had allowed this amendment to be made without objection. *Flagg v. Worcester*, 8 Cush. 69. But there is no suggestion and no room for a contention that the defendant had waived any of its rights. It follows that Mrs. Partridge has lost both her right and her remedy to recover these damages, by her failure to act in the manner and within the time provided by the statute; and, as already stated, the Superior Court had no jurisdiction to entertain her petition therefor. *Lancy v. Boston*, 185 Mass. 219. *Gately v. Old Colony Railroad*, 171 Mass. 494. *Custy v. Lowell*, 117 Mass. 78. *Cambridge v. County Commissioners*, 117 Mass. 79, 83. Accordingly, as in *Peterson v. Waltham*, 150 Mass. 564, the only effect of allowing this amendment and giving to Mrs. Partridge liberty to appear as a co-petitioner would be to deprive the court of jurisdiction to hear her case; and the court had no power to allow the amendment.

Nor is it any objection to this result that Mr. and Mrs. Partridge might perhaps have joined in one petition to the selectmen for the assessment of their damages. If we assume that the provisions of Pub. Sta. c. 49, § 34, were applicable to a petition under c. 52, § 15, (see *Onset Street Railway v. County Commissioners*, 154 Mass. 395,) yet it remains true that the rights of these peti-



tioners were strictly several, and in no sense did they have any joint interest; nor could compliance with the statutory requirements by one of them in his own behalf enure in any way to the benefit of the other. The difficulty is not that the Superior Court could not allow the bringing in of new parties by amendment; the existence of that power is now well settled, and needs no citation of authorities to support it. In the case at bar the insuperable difficulty is that it appears by the bill of exceptions that the Superior Court had no jurisdiction to entertain the petition of Mrs. Partridge, and so could not allow her to appear as a co-petitioner.

*Exceptions sustained.*

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WILLIAM D. CANNON, JR., & another vs. WILBUR F.  
BURRELL.

Plymouth. November 22, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Contract, Validity. Sale. Evidence.*

In an action for goods sold and delivered, it appeared that the defendant ordered the goods upon a printed blank of the plaintiff, which he signed after having had an ample opportunity to read and understand it. In this instrument it was stated that the signer had "no agreement or understanding with salesman except as printed or written on this order" and that separate verbal or written agreements with salesmen were not binding upon the plaintiff, also that all conditions of sale must be shown on the order, "this sale being made under inducements and representations herein expressed and no others." The defendant offered evidence that he bought the goods upon certain oral representations made by a salesman of the plaintiff and that he shipped back the goods to the plaintiff when he found that the representations were false. The trial judge ruled that the defence that the defendant was induced to enter into the contract by false representations of the plaintiff's agent was not open to the defendant, and that the evidence to that effect offered by the defendant was immaterial. *Held*, that the ruling was right; that the contract was valid and binding, and that by it the defendant expressly had agreed that no salesman of the plaintiff had authority to change the terms of the contract in writing by any inducements or representations.

LORING, J. This is an action by individuals doing business under the name of the French and American Importing Com-

pany, for goods sold and delivered under an order on that company signed by the defendant, whose place of business was in Rockland. The order was made out on a printed blank, and stated *inter alia* that the goods were ordered "in accordance with all the terms above specified; which we have carefully read and find it to be complete and satisfactory. We have no agreement or understanding with salesman except as printed or written on this order." In the "terms of sale" "above specified" is the following provision: "Separate verbal or written agreements with salesmen are not binding upon French and American Importing Co. All conditions of sale must be shown on this order, this sale being made under inducements and representations herein expressed and no others."

"The defendant read, or had ample opportunity to read and understand, the contract before so signing."

The defendant at the trial offered evidence that he was induced to buy the goods by an oral representation made by one Brainerd, the plaintiff's salesman, that "he [the salesman] would give him [the defendant] exclusive sale of said goods in Rockland and vicinity."

The defendant proved by Brainerd that he carried "a line of samples . . . and used the same line of samples in selling goods under the name of the French and American Importing Company and under the name of W. D. Cannon and Company." The salesman also testified that while the goods were "substantially similar," they were "put up differently," "and the list of goods was different." The salesman admitted in his testimony that "he said he would give the defendant the exclusive sale of the French and American Importing Company goods in the boot and shoe trade in Rockland."

The defendant then testified that on the day the goods ordered were delivered at his store, and after they were delivered, he learned that the W. D. Cannon and Company goods were for sale in Rockland under a contract made with the plaintiffs through the same salesman. The defendant thereupon shipped the goods back to the plaintiffs, but the plaintiffs refused to take and did not take them back.

The case was heard by a judge of the Superior Court without a jury. On this evidence the judge "did not pass upon the

claim made by the defendant that he was induced to enter into said contract by reason of false representations on the part of Brainerd, as . . . [he] . . . did not deem the question open to the defendant or material, in view of the contract in writing made by the parties," and gave certain rulings asked for by the plaintiffs, to which the defendant took exceptions. The judge found for the plaintiffs, and the case is here on these exceptions.

The defendant was bound by the terms of the contract made in writing by and between him and the plaintiffs. *Grace v. Adams*, 100 Mass. 505. *Wood v. Massachusetts Mutual Accident Association*, 174 Mass. 217. *Nourse v. Jennings*, 180 Mass. 592. *Fay v. Hunt*, 190 Mass. 378.

By agreeing that "separate verbal or written agreements with salesmen are not binding upon" the plaintiffs, and that the sale was "made under inducements and representations herein expressed and no others," the defendant agreed with the plaintiffs that in making the contract he would deal with the plaintiffs' salesman on that basis and no other. That is to say, on the basis that the salesman had no authority to change the terms of the written contract by any "inducements," "representations" or "separate verbal or written agreements." Such an agreement is binding. *Kyte v. Commercial Union Assur. Co.* 144 Mass. 43. *Porter v. United States Ins. Co.* 160 Mass. 183. *Equitable Manuf. Co. v. Biggers*, 121 Ga. 381. *McCormick Harvesting Machine Co. v. Allison*, 116 Ga. 445. *Furneaux v. Esterly*, 36 Kans. 539.

For these reasons the presiding judge was right in not passing upon the claim made by the defendant that he was induced to enter into the contract by reason of false representations on the part of the salesman.

*Exceptions overruled.*

*W. J. Coughlan*, for the defendant.

*C. R. Darling*, (*G. F. Wales* with him,) for the plaintiffs.

EVELYN B. RANSOM vs. MAYOR OF THE CITY OF BOSTON  
& another.

Suffolk. November 23, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Veteran. Civil Service. Mandamus. Election. Practice, Civil, Election of Remedy.*

A veteran employed by a city as a laborer under R. L. c. 19, §§ 23, 24, and the rules made by the civil service commissioners under the last named section, who wrongfully is discharged and refused employment by the city while there is work to be done of the kind for which he was employed and he is competent to perform it, may compel his reinstatement by a writ of mandamus addressed to the mayor of the city and the head of the department in which he was employed although he has brought an action of contract against the city, which still is pending, to recover the wages which he lost during the time that he was excluded from employment.

PETITION, filed July 6, 1905, and amended July 24, 1906, for a writ of mandamus addressed to the mayor and the superintendent of public grounds of the city of Boston, ordering them to reinstate the petitioner in his employment as a laborer in the public grounds department of that city.

The case was heard by *Loring, J.* The petitioner made an offer of proof tending to show that he was a veteran within the meaning of the civil service laws; that he had been employed as a laborer in the public grounds department and subsequently was discharged without a hearing; and that he was refused further employment although there was work to be done in that department which the petitioner was capable of doing and ready to do.

It further appeared that on November 4, 1903, the plaintiff brought an action of contract against the city of Boston for the wages lost by him during the period in which he was refused employment. At the trial of that action in the Superior Court the presiding judge ordered a verdict for the defendant, and the plaintiff alleged exceptions, which were sustained by this court on June 20, 1906, in a decision reported in 192 Mass. 299. That action was pending when the petition was filed.

At the conclusion of the reading of the offer of proof, the justice ruled that the petitioner had mistaken his remedy and that the offer of proof did not show that the petitioner had a right to a writ of mandamus. He excluded the evidence offered and ruled that the petition could not be maintained. The petitioner alleged exceptions.

*J. K. Berry*, (*E. C. Upton* with him,) for the petitioner.

*P. Nichols*, for the respondents.

SHELDON, J. Upon the petitioner's offer of proof, he had a right to employment by the city of Boston, so long as he was able to do the work for which he was employed and the occasion for that work continued. R. L. c. 19, §§ 23, 24. The rules established by the civil service commissioners under the latter section, so far as they bear upon this question, are referred to in *Ransom v. Boston*, 192 Mass. 299, in which the rights of this petitioner to recover wages were considered.

But it is contended by the respondent that the petitioner is not entitled to enforce this right by mandamus to compel the respondents to reinstate him in the employment which has been wrongfully taken from him; that his sole remedy is by an action of contract to recover the pecuniary damage which he has suffered by the breach of his contract of employment; and at any rate that, having brought such an action, which is still pending (see *Ransom v. Boston*, *ubi supra*) he has elected to avail himself of a remedy inconsistent with that which he now seeks, and so cannot maintain this petition.

It is not disputed that when a public officer has been unlawfully ousted from his position the proper means for him to regain his office is by petition for a writ of mandamus. *Fowler v. Brooks*, 188 Mass. 64, 65. *Russell v. Wellington*, 157 Mass. 100. *Conlin v. Aldrich*, 98 Mass. 557. It is already settled that the petitioner's rights are on a par with those of a public officer. As was said in the opinion in *Ransom v. Boston*, 192 Mass. 299, "We see no valid distinction, at least as to the right to continued employment, between the case of a veteran who has been duly registered, certified and employed in the labor service of a city or town and the case of a veteran who has been duly examined, registered and employed as a public officer. . . . The Legislature intended to provide as much in the former case

as in the latter for the continuous employment of a veteran. . . . The manifest purpose of the statute was to secure the employment of veterans in the labor service of the Commonwealth and its cities and towns in preference to all other persons except women, if the veterans are competent to perform the labor." We ought not to say that the officers of the city of Boston can frustrate this legislative intent with no other liability than for the payment of damages to the particular individual who has suffered by their misconduct.

Nor has the petitioner elected, by bringing his former action, to enforce a remedy inconsistent with that for which he now asks. According to his offer of proof, that action was brought for the wages which he had lost for the time during which he was excluded from his employment. His position in that action was the same as it is in this petition, that he was still lawfully in the employment of the city and had a right to remain so. That action was not for the recovery of damages for the wrongful breach of his contract. Accordingly the doctrine of *Butler v. Hildreth*, 5 Met. 49, and the numerous cases which have followed that decision cannot harm the petitioner, even if we should hold that the prosecution of one remedy was barred by the mere fact that the same claimant had previously, in another proceeding, sought to recover upon a different and inconsistent ground. Nor is there anything in the opinion in *Ransom v. Boston*, 192 Mass. 299, at variance with sustaining this petition. The statement that the petitioner should not be required to establish his rights by mandamus before maintaining that action, or be restricted to a remedy for the recovery of his wages against the person who had been employed in his stead, is far from being a decision that he could not maintain a petition for mandamus to be reinstated in his rightful employment.

The petitioner has no such plain and adequate remedy by an action for damages that he should be denied relief in this manner. The damages that he could recover in an action for the breach of his contract of employment must be conjectural, and might well be inadequate; at any rate they could not be assessed with any degree of certainty. Successive actions for the amount of his wages, as these should accrue from time to time, would be far from giving him adequate redress. He is entitled to receive

his wages weekly, R. L. c. 106, § 62, not at such intervals as might make it worth his while to institute actions therefor. He has a right to receive the full amount of his wages, not lessened by the expense of recurring litigation. It is only in such a proceeding as this that a full measure of relief can be given to him. *Raisch v. Board of Education*, 81 Cal. 542.

There is sufficient authority to say that this petitioner, having no other adequate redress, may by mandamus compel the respondents to perform the public duty to continue his employment which rests upon them. *Sullivan v. Gilroy*, 55 Hun, 285. *People v. Hayes*, 94 N. Y. Supp. 754. *People v. Morton*, 24 App. Div. (N. Y.) 563. *In re Ostrander*, 12 Misc. (N. Y.) 476. *People v. Sutton*, 88 Hun, 173. *People v. Board of Public Parks*, 17 N. Y. Supp. 589. *Shaw v. City Council of Marshalltown*, 104 N. W. Rep. 1121. *Union Pacific Railroad v. Hall*, 91 U. S. 843, 855, quoted in *Attorney General v. Boston*, 123 Mass. 460, 479. The respondents, on the petitioner's offer of proof, have no discretionary power to act or to refuse to act; but it is their duty to reinstate him in his employment. He has an absolute right to their performance of that duty. *French v. Jones*, 191 Mass. 522, 531.

*Exceptions sustained.*

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LAFAYETTE G. BLAIR vs. COLUMBIAN FIREPROOFING  
COMPANY.

Suffolk. November 23, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Attorney at Law.*

In an action for services as an attorney at law, where an auditor has found that certain sums of money received by the plaintiff properly were credited by him as retainers and the auditor's report shows that the payments were demanded as retainers and were sent by the defendant to the plaintiff as retainers, the inference is warranted that the amounts of these retainers were agreed upon between the parties.

CONTRACT for \$1,300 and interest for services as an attorney at law. Writ dated June 2, 1904.

The case was before this court at a previous stage on excep-

tions which were sustained by a decision reported in 191 Mass. 333.

The auditor having filed a supplemental report, as mentioned below in the opinion, the following agreement was made by the parties :

"In the above entitled action, it is hereby agreed that the reports of the auditor filed in said action, so far as any facts therein stated are concerned, be taken as a statement of agreed facts, and that, if the court is of the opinion that such agreed facts warrant the conclusion reached by the auditor in his last report, the judgment shall follow the auditor's finding in said last report; otherwise such finding shall be reduced by the sum of four hundred dollars."

By the facts as thus agreed it appeared that the plaintiff was retained by the defendant to render the services mentioned in his declaration; that he received the three retainers mentioned in the first three counts, amounting in all to \$800; that they were asked for and paid as retainers, and "agreed upon by the parties" as such; that the plaintiff rendered services which reasonably were worth \$1,350, of which he received \$250 on account and no more, leaving a balance of \$1,100; that a demand was made on February 5, 1904, upon the defendant for payment of \$750 of the amount then due, and that no payment on account of the balance ever was made.

In his last report the auditor found that the plaintiff was entitled to recover a balance of \$1,100, with interest on \$750 thereof from February 5, 1904, and interest on the remaining \$350 from the date of the writ.

In the Superior Court *Bond, J.* on the agreed facts ordered judgment for the plaintiff in the sum of \$1,251.02; and the defendant appealed.

*R. K. Dickerman*, for the defendant, submitted a brief.

*J. S. Patton*, for the plaintiff.

KNOWLTON, C. J. Since the decision reported in 191 Mass. 333, this case has been recommitted to the auditor, and his supplemental report has been filed. The case now comes before us on an appeal from the judgment of the Superior Court, which presents only the question whether the facts stated in the reports of the auditor warrant the conclusion reached by him in his last report.



We are of opinion that they do. In those parts of the account in which he finds that sums received by the plaintiff were properly credited as retainers, the facts reported show that they were demanded as retainers and sent by the defendant as retainers. The inference fairly follows that the amounts of these retainers were agreed upon between the parties.

The findings as to the value of the plaintiff's services show no error of law.

*Judgment affirmed.*

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**IGNOS ANTERNITZ, JR., vs. NEW YORK, NEW HAVEN, AND  
HARTFORD RAILROAD COMPANY.**

**IGNOS ANTERNITZ, SR., vs. SAME.**

Suffolk. November 28, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Railroad. Practice, Civil, Exceptions.*

If a boy eight years and five months old, with two other boys, is playing on the top of a freight car which forms part of a train, and is seen there by a brakeman who walks by on the top of the car, and if four or five minutes later this brakeman or another, while standing near the car on the top of which the boys are sitting, gives the signal to start the train without paying any attention to the boys, and, as the train begins to jerk more and more in starting, the first mentioned boy loses his balance and falls between the cars and is injured, in an action against the railroad company for his injuries these facts are not evidence of wanton conduct on the part of the servants of the company and give the boy as a trespasser no right to go to the jury.

The exclusion of a question gives no ground for exception if undisputed evidence subsequently admitted shows fully the fact which the testimony called for by the question was offered to prove.

TWO ACTIONS OF TORT, the first by a boy, a little less than eight years and five months of age when injured, for personal injuries incurred on May 29, 1902, alleged to have been caused by the wanton and reckless conduct of the defendant toward the plaintiff while he was upon certain of its cars in a freight yard of the defendant near the Gold Street bridge in that part of Boston called South Boston, when the defendant knew or ought

to have known that he was there, and the second by the father of the plaintiff in the first case for the loss of his services by reason of his injuries. Writs dated September 15, 1902.

In the Superior Court *White*, J. ordered verdicts for the defendant; and the plaintiffs alleged exceptions.

*E. M. Brooks*, for the plaintiffs.

*J. L. Hall*, for the defendant, was not called upon.

LOBING, J. A double track of the defendant runs from the main line near Swett Street in a cut under Fifth Street, Gold Street, and Fourth Street bridges in South Boston. On May 29, 1902, a freight train of box cars was on its way from Swett Street to the freight terminal over these tracks. The engine had passed under Fifth Street bridge, and was stopped by a signal on Fourth Street bridge. There are stone retaining walls on each side of the cut at this point. After the train stopped, the plaintiff in the first case, (who will be spoken of hereafter as the plaintiff,) and two other boys, stepped from the top of the retaining wall on to the top of one of the box cars, a distance of fifteen to eighteen inches. Apparently the car in question was the third back from the engine. The boys sat down on the top of the car, and stepped off on to the wall and back once or twice. After some twelve minutes the train started; the boys thereupon got up, and in place of stepping directly off the side of the car on to the wall, went to the rear of the car apparently to get a longer ride. One boy had stepped on to the fourth car when the plaintiff, who was standing "right on the very edge," to use his own words, just as the train "began to jerk more and more as a train will when it starts," lost his balance, fell between the two cars and suffered the injuries here complained of.

This plaintiff was a boy eight years and five months old at the time. He was playing with his companions on the car, and it is admitted that he was a trespasser. He had often played on and about the cars before, and he knew that he was not wanted there. It also appeared that he was entirely familiar with the signals at Fourth Street bridge for stopping trains and allowing them to go on.

The only duty owed to this plaintiff was (1) not wilfully to injure him, and (2) not to act with a wanton disregard for his

safety. No contention has been made that the defendant committed a wilful injury.

What the plaintiffs rely on in making out a case of wantonness on the defendant's part is testimony that some four or five minutes before the train started a brakeman walked on the top of the car in question past the boys as they sat on the top of it, and disappeared in the direction of Fifth Street bridge, and the further fact that this or another brakeman gave the signal to start the train while standing near the car on which they were sitting at the time, from which the jury were warranted in finding that he knew the boys were on the car.

The plaintiffs have asked us to hold that to start the train in the usual way under these circumstances without first removing the trespassers or taking measures for their safety was an act of wanton disregard for their safety. We cannot assent to this view of the defendant's action. On the contrary the case is not so strong for the plaintiff as *Bjornquist v. Boston & Albany Railroad*, 185 Mass. 130; *Albert v. Boston Elevated Railway*, 185 Mass. 210; *Mugford v. Boston & Maine Railroad*, 173 Mass. 10; all of which were cases of infants.

At the beginning of the trial, while the infant plaintiff was on the stand, he was asked this question: "Before this day when you were hurt, what had you seen with regard to other children on the train?" This was objected to by the defendant and excluded on the plaintiff's stating that it was "offered as showing knowledge on the part of the defendant." The evidence subsequently admitted showed fully the defendant's knowledge of what the plaintiff and his companions were doing on the day in question, and its knowledge that he and other children were in the habit of playing on the top of freight cars as the plaintiff and his companions were doing on the day in question. If the testimony was competent the plaintiff was not injured by its exclusion.

*Exceptions overruled.*

## FREDERICK H. PRINCE vs. CITY OF BOSTON.

Suffolk. November 23, 1906. — January 3, 1907.

Present : KNOWLTON, C. J., HAMMOND, LORING, BRALEY, &amp; SHELDON, JJ.

*Tax. Broker. Words, "Goods, wares, merchandise."*

The provision of Pub. Sts. c. 11, § 20, cl. 1, that "All goods, wares, merchandise, and other stock in trade . . . shall be taxed in those places where the owners hire or occupy manufactories, stores, shops, or wharves," does not describe or include the capital used by a stockbroker in his business, and such capital is taxable to the stockbroker where he has his home and not where he has his office.

CONTRACT for the amount of a tax of \$665 paid under protest assessed for the year 1899 upon the capital used by the plaintiff in his business as a stockbroker in the city of Boston, which was valued upon the first day of May, 1899, at \$50,000. Writ dated September 9, 1904.

In the Superior Court *Wait*, J. refused to rule that the plaintiff could not recover, and ruled that the undisputed facts in the case would not warrant the jury in finding that the plaintiff had a wharf, shop or store in the city of Boston within the meaning of Pub. Sts. c. 11, § 20. He submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$934.15; and the defendant alleged exceptions.

*S. M. Child*, for the defendant.

*S. C. Brackett*, for the plaintiff.

LORING, J. The sole question presented here is whether an inhabitant of Wenham carrying on the business of a banker and broker at an office in Boston in the year 1899 should have been taxed for the capital used in that business in Wenham or in Boston.

The plaintiff contends that that capital should have been taxed in Wenham under Pub. Sts. c. 11, § 20. The defendant contends that it was taxed properly by the assessors of the defendant city, under the first clause of that section.

The history of this clause (Pub. Sts. c. 11, § 20, cl. 1) is stated in *Hittinger v. Westford*, 135 Mass. 258, and in *Boston Loan Co. v. Boston*, 137 Mass. 332. As stated in those cases, the scope of

the original act (Prov. St. 1753-54, c. 10, § 3; 3 Prov. Laws, 693) was enlarged by St. 1821, c. 107, and St. 1839, c. 139, when, so far as the substance of the act goes, it was put into its present form. The question here is whether the language then adopted is broad enough to reach this case. The defendant relies on the fact that stocks and bonds are goods, wares and merchandise within the statute of frauds. *Tisdale v. Harris*, 20 Pick. 9. *Somerby v. Buntin*, 118 Mass. 279. But it does not follow from that that they are goods, wares and merchandise within Pub. Sta. c. 11, § 20, cl. 1, where they are coupled with the words "other stock in trade," and with the requirement that the "owners hire or occupy manufactories, stores, shops, or wharves."

In *Boston Loan Co. v. Boston*, 187 Mass. 832, this court held with great hesitation that a pawnbroker's shop was within this clause of the act. But to hold that a banker and broker's office is within the act would be taking a decided step beyond the step taken in that case. The business carried on by a banker and broker is not the kind of business which is carried on in a shop or store and the capital employed therein is not usually or properly spoken of as "goods, wares, merchandise, and other stock in trade" or either of them. For these reasons the first clause of Pub. Sta. c. 11, § 20, does not in our opinion apply in the case at bar. The capital of the plaintiff used in his business as a banker and broker was taxable under Pub. Sta. c. 11, § 20, in the town of Wenham where he had his home. See *Barron v. Boston*, 187 Mass. 168. See also in this connection *Martin v. Portland*, 81 Maine, 293.

*Exceptions overruled.*

**WILLIAM A. SIMS vs. POLICE COMMISSIONER FOR THE CITY OF BOSTON.**

Suffolk. November 23, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Municipal Corporations. Boston. Police. Veteran. Civil Service.*  
*Mandamus. Laches.*

A janitor of a police station in Boston is not a police officer nor a member of the police department of that city, and the provision of St. 1878, c. 244, § 3, that officers or members of the police department may be removed by the board of police commissioners "for cause," creates no limitation on the power to remove such a janitor. The power of the police commissioners in this regard has not been abridged by St. 1885, c. 323.

St. 1885, c. 266, § 5, providing that the officers and boards of the city of Boston appointed under the amended charter of that city may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," does not apply to a removal made by the board of police commissioners, who are appointed by the Governor of the Commonwealth and are not officers or a board of the city of Boston.

The provision of St. 1896, c. 517, § 5, now embodied in R. L. c. 19, § 23, that no veteran holding an office or employment in the public service of a city or town shall be removed except after a full hearing, applies only to veterans who hold offices or employments under the statutes and rules relating to the civil service, and does not apply to the removal of a person employed as the janitor of a police station in Boston before such employment was included in the list of positions to be filled by certificates from the board of civil service commissioners, and where the person removed never had been registered in the office of that board as a veteran or had been certified for appointment.

A veteran employed by a city from a certified list under the statutes and rules relating to the civil service, if removed without a full hearing in violation of R. L. c. 19, § 23, is entitled to a writ of mandamus ordering his reinstatement, and a petition for such a writ filed a little more than two years and one month after the removal is not barred by laches as a matter of law for that reason only.

PETITION, filed on May 14 and amended on May 22, 1906, for a writ of mandamus addressed to Charles H. Cole, Jr., Harry F. Adams and W. H. H. Emmons, the board of police commissioners for the city of Boston, to compel the reinstatement of the petitioner as the janitor of police station No. 5 in Boston, from which employment he was removed on April 15, 1904, the petitioner by his amendment being alleged to be a veteran of the civil war within the meaning of R. L. c. 19, § 20.

The respondents alleged in answer to the petitioner's amendment that the petitioner before July 1, 1905, was not registered in the office of the civil service commissioners as a veteran, and that those commissioners had not before July 1, 1905, included in the list of positions to be filled by their certification that of janitors of police stations in the city of Boston.

By an amendment, filed and allowed by consent on June 6, 1906, Stephen O'Meara, the police commissioner for the city of Boston, was substituted as respondent for the respondents originally named.

The case came on to be heard by *Sheldon, J.* upon the pleadings and an agreed statement of facts. The justice reserved the case for determination by the full court, a writ of mandamus to reinstate the petitioner, with payment of back wages or salary, to issue if the petitioner was wrongfully discharged, or such other order to be made as justice might require.

The agreed statement of facts was as follows :

1. That the petitioner was lawfully employed to do the usual work of a janitor at police station No. 5 in Boston from 1884, and so worked until April 14, 1904, and received as compensation \$12.70 per week.

2. That on or about April 15, 1904, by an oral order or direction of commissioner Harry F. Adams, the petitioner was told by Captain O'Lalor that he was to be discharged, another man was put in his place, and the petitioner has been trying to be reinstated ever since.

3. That no written order of discharge or removal with the causes therein assigned ever was given to the petitioner or recorded in the records of the board of police, or any hearing given to the petitioner.

4. That previous to his discharge the petitioner had been informed that his work as janitor at police station No. 5 was unsatisfactory.

5. That the petitioner is a veteran of the civil war, having served in the army of the United States during the war of the rebellion and having been honorably discharged therefrom.

6. That the board of civil service commissioners had not, before July 1, 1905, included in its lists of positions to be filled by

its certification that of janitors of police stations in the city of Boston, and that the petitioner had never at any time before his discharge been registered in the office of that board as a veteran, nor certified by it for appointment, but has been duly registered since July 1, 1905, as janitor.

7. That the rules of the board of civil service commissioners, if competent, may be referred to.

The case was submitted on briefs.

*B. F. Briggs*, for the petitioner.

*L. A. Rogers*, for the respondent.

SHELDON, J. The petitioner was in no sense a police officer. The ordinary duties of a janitor at a police station are in no respect similar to those of a police officer. He was not a member of the police department. His appointment does not come within the provisions of St. 1878, c. 244, § 8; and the limitation imposed upon the power of removal of the officers or members of the police department was not created for his benefit, and is not available for his protection. The doctrine of *Ham v. Boston Board of Police*, 142 Mass. 90, cannot be applied in this case. The St. of 1885, c. 323, contains nothing to prevent the board of police of Boston from discharging one of their employees whenever in their judgment it might be advisable to do so; nor has our attention been called to any subsequent legislation having this effect, unless it be found in the statutes regulating the civil service and fixing the right of veterans presently to be considered. *O'Dowd v. Boston*, 149 Mass. 443. *Attorney General v. Donahue*, 169 Mass. 18.

The petitioner was not protected by the provisions of St. 1885, c. 266, § 5, that officers and boards of the city of Boston may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," because the police commissioners were not officers or a board of the city of Boston, but were appointed by and were responsible to the Governor of the Commonwealth. *Commonwealth v. Plaisted*, 148 Mass. 375, 383, *et seq.* *Phillips v. Boston*, 150 Mass. 491, 494.

But it is contended that the petitioner was a "veteran holding an office or employment in the public service" within the meaning of St. 1896, c. 517, § 5, now embodied in R. L. c. 19, § 23, and accordingly could not be removed without the hearing pro-



vided for in that section. But the difficulty with this position is that, as appears by the agreed facts, the board of civil service commissioners did not, until after the petitioner's discharge, include the petitioner's employment in its list of positions to be filled by its certification, nor had the petitioner before his discharge been registered in the office of the board as a veteran or been certified by it for appointment; and this petition must be determined upon the facts which existed at the time of his discharge. *Ayers v. Hatch*, 175 Mass. 489, 490: It was said in that case by Morton, J., referring to the St. of 1896, c. 517: "It is plain, it seems to us, that the statute was intended to provide for the preference of veterans in the offices and employments coming within the scope of St. 1884, c. 820, commonly known as the civil service act, and the acts in amendment thereof, and that the provisions of § 5 apply to veterans who hold offices and employments under and pursuant to the statutes relating to civil service and the rules established by the civil service commissioners. Section 1 defines the word 'veteran' as used in the act. Sections 2, 3 and 6 relate to the examination and appointment of veterans to positions 'in the public service classified under chapter three hundred and twenty of the acts of the year eighteen hundred and eighty-four and acts in amendment thereof and the civil service rules thereunder, subject to such rules,' and to their employment 'in the labor service of the Commonwealth and of the cities and towns thereof' under rules established by the civil service commissioners. Section 4 contains directions to the commissioners respecting the preparation of lists of applicants for positions in the public service who have passed the examinations, and of those who have been certified for appointment or employment. Then comes § 5, and it seems to us that it would be wresting it from its connection and giving to it an effect that it was not intended to have to hold that it was intended to apply to any veteran who was in the public service of a town or city in an office or employment of a civil nature. The more reasonable construction is, we think, that it was intended to prevent the removal or suspension or transfer without his assent and without a full hearing of a veteran who had been appointed under the statutes and rules relating to the civil service; thus continuing to him after his appointment the same preference over others

who were not veterans, as before his appointment." And see *Johnson v. Kimball*, 170 Mass. 58.

If any part of the petitioner's salary or wages has been unjustly detained from him, he has a full remedy for the recovery thereof; but he shows no right to a mandamus to reinstate him in the position from which he has been discharged. We do not doubt, however, that, if the petitioner had the rights which he claims, mandamus would be a proper remedy for their enforcement; nor could we say that he was barred by laches. *Ransom v. Mayor of Boston*, ante, 537.

*Petition dismissed.*

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FRANCIS B. SEARS, trustee, vs. ATTORNEY GENERAL & others.

Suffolk. December 3, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, & RUGG, JJ.

*Charity. Trust. Religious Society.*

A fund of which the income is to be devoted to religious uses in connection with a particular church is a public charity. Following *Osgood v. Rogers*, 186 Mass. 238, and declaring that anything to the contrary in *Parker v. May*, 5 Cush. 386, and *Old South Society v. Crocker*, 119 Mass. 1, has been overruled by the later decisions.

A fund was established by the contributions of persons connected with a particular church and religious society, the income of which was to be used to provide for the widow and minor children of a deceased bishop and rector of that church, then to be used for the support of the widow or orphan children of any rector of the same church, and, if by accumulations the fund should yield an income of more than \$1,000, then funds were to be created for the widows and minor children of the assistant minister of the same church, and next for the support of the dignity of the bishop of Massachusetts when such bishop should be the rector of the same church, and then for the use and benefit of the bishop, rector, assistant minister or such other object connected with the same church as the wardens and vestry thereof for the time being might deem advisable. *Held*, that the fund constituted a public charity, and that on a proper case being made out the court would direct its administration *cy pres*.

KNOWLTON, C. J. This case was heard before a single justice and reserved for the full court upon the question "Whether the widow and orphans' fund of Trinity Church in the city of

Boston is a fund held upon such a charitable trust that it may, on a proper case being made out, be directed by the court to be applied *cy pres*." The facts proved and the scheme proposed at the hearing are not reported, and we have no occasion to consider anything but the question presented by the reservation.

This fund was originally raised by a subscription of persons connected with Trinity Church in 1804, and was stated to be "for the benefit of the widows and orphan children that may be left by the future ministers of this church." Since then it has increased greatly by accumulation. In another part of the subscription paper, after referring to the annuity for the benefit of Mrs. Anne Parker, widow of a deceased bishop and rector of the church who was primarily to receive the income, it was said that after her decease the fund was "to be directed to the benefit of the successive clergymen of said parish," etc. At a meeting of the subscribers held on December 30, 1804, a scheme for the management and use of the fund was voted, providing that the income should be used, first, for the benefit of the widow and minor children of the late Bishop Parker, and then to be paid to the widow or orphan child or children of any rector of the church, and if, by accumulation, the fund should become so large as to yield an annual income of more than \$1,000, new funds should be created from the accumulation as follows: First, one for the widows and minor child or children of the assistant minister of the church, and then one for the support of the dignity of the bishop of Massachusetts when such bishop should be the rector of Trinity Church, and then one for the "use and benefit of the bishop, rector, assistant minister, or to such other object connected with this church, as the wardens and vestry thereof for the time being, may in their judgment deem fit and advisable." Provisions were made as to the amounts that might be expended for each of these objects, in succession, before the application of any money to the creation of the next fund mentioned in order, and other details as to the management and use were prescribed, which we need not consider. The payments that may be made to widows and minor children were limited to cases in which they had no considerable income from other sources, and these payments were not to

exceed \$1,000 per year to the widow and minor children of the rector, and \$800 per year to the widow and minor children of the assistant minister.

By the St. 1830, c. 83, Trinity Church was incorporated, and provision was made in § 4 of the act for the appointment of a trustee or trustees to hold and manage this fund, conformably to the directions given in the vote already referred to.

As a general proposition, a gift made for the support of needy widows and orphans of a particular class is an eleemosynary public charity. This has been established by so many cases, and with such full discussion, that there is no occasion to consider the reasons on which the rule is founded. *Saltonstall v. Sanders*, 11 Allen, 446, 457. *Jackson v. Phillips*, 14 Allen, 589, 551. *Burbank v. Burbank*, 152 Mass. 254, 256. *Minns v. Billings*, 183 Mass. 126, 129. *Attorney General v. Goulding*, 2 Bro. C. C. 428. *Collinson v. Pater*, 2 Russ. & Myl. 844. *Bristow v. Bristow*, 5 Beav. 289. *Thompson v. Corby*, 27 Beav. 649. *Thompson v. Thompson*, 1 Coll. C. C. 381, 392.

The gift in the present case is primarily to persons of a class, and not to designated individuals. The members of this class, for all time, are to take. The class, considered strictly, is very small, and the only question is whether the object is so general and indefinite as to be deemed of common and public benefit, and so a public charity. It includes the families of deceased clergymen of the Protestant Episcopal Church, and the selection of them is limited to those in which the husband or father was a rector or assistant minister of Trinity Church. In the course of many years the number benefited might be large, and while the number ultimately receiving a direct benefit is limited to those connected with this religious society, the larger class of clergymen of the same religious faith are indirectly helped by the chance that they may be chosen to one of these places and their families receive assistance from this fund. In *Attorney General v. Old South Society*, 18 Allen, 474, 475, 476, 492, it appears that a fund was established "for the support of the widows and fatherless children of ministers of the church," and although it is not expressly stated that this was a public charity, the decision of the case seems to have been upon that assumption. In *Kent v. Dunham*, 142 Mass. 216, a devise to trustees, expressed to be

“for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid,” was held to be not a public charity, and void. We infer, although the statement in the opinion is not in these terms, that one reason of the decision is that the class was not sufficiently large and indefinite to make the gift of common and public benefit.

We think that there are strong reasons for holding that the fund in the present case is a public charity, viewed solely in its eleemosynary aspect; but we do not decide this, for we think the plaintiff's other contention, that it is good as a religious charity, should be sustained.

When the different provisions of the vote of the subscribers are considered, it becomes plain that their principal object was religious. They were providing for the encouragement and support of the rector by establishing a fund which would ensure the proper maintenance of his wife and minor children if he died and left them without property. This should be regarded as a gift for the support of the rector. *Anon.* 2 Vent. 349. *Attorney General v. Cock*, 2 Ves. Sr. 273. *Doe v. Aldridge*, 4 T. R. 264. *Attorney General v. Lawes*, 8 Hare, 32. After making provision for the families of the rector and the assistant minister, the fund, if large enough, was to be used for the bishop of Massachusetts when a rector of that church, and then, if its accumulations became sufficient, it was to be applied to the use and benefit of the bishop, rector, assistant minister, or to other objects connected with the church, in the discretion of the wardens and vestry. In general terms, the money was to be devoted to religious uses in connection with this church.

Is a gift of money for such a use a public charity? There have been decisions and dicta in this Commonwealth, which, if they embodied the whole law on the subject, would require an answer in the negative. But these are few. They were induced by peculiar conditions, and they are at variance with the general course of decision elsewhere and with the later decisions of this court. The question was expressly decided in *Osgood v. Rogers*, 186 Mass. 238, in which we find this language: “Whatever doubt may have existed formerly, it must be regarded as now settled in this Commonwealth by more recent decisions that a

gift to a church generally creates a public charity. *McAlister v. Burgess*, 161 Mass. 269. *Bartlett, petitioner*, 163 Mass. 509. *Minns v. Billings*, 183 Mass. 126. If a gift to a church generally creates a valid public charity, we can see no good reason why a gift to the pastor and deacons of a church as trustees and their successors forever for the support of the church in its religious worship should not also be held to create a public charitable trust." In *Minns v. Billings*, *ubi supra*, although it does not appear in the published report, several of the gifts sustained as public charities were for the support of religious worship in churches. The doctrine is supported by some of our older cases as well as by recent ones. In *Earle v. Wood*, 8 Cush. 430, 445, 448, Chief Justice Shaw said, "All gifts and grants in trust, for the support of public worship and religious instruction, or for the advancement of piety, morality, and useful education, are valid as charitable trusts, and will be carried into effect by this court as a court of equity." The trust was sustained as "being for the uses of a religious body, to support public worship and religious instruction, and thus a recognized charity." A similar decision was made for the same reasons in *Dexter v. Gardner*, 7 Allen, 243.

The decision in *Attorney General v. Federal Street Meeting-house*, 3 Gray, 1, 49, was put upon the ground that the purpose "was to constitute a religious society, for the use of the members and proprietors who might be pewholders, or of them with other members, according to circumstances," and not for the public. This ground of decision, which seems to have been given weight in some of the cases, is not according to the conditions existing in modern churches. Most churches are not only open to the public, but their proprietors seek to promote religion and morality among the people generally. In *St. Paul's Church v. Attorney General*, 164 Mass. 188, 197, it was said that "A gift to a church *eo nomine* is a gift to a charity." In *Attorney General v. Union Society*, 116 Mass. 167, a trust for the maintenance of a minister and public worship in a mission chapel is treated as a valid charity.

So far as there is anything in *Parker v. May*, 5 Cush. 336, in *Old South Society v. Crocker*, 119 Mass. 1, or in other cases in this court, at variance with the decision in *Osgood v. Rogers*,

*ubi supra*, they must be considered as overruled by the later decisions.

We are of opinion that the question reserved must be answered in the affirmative.

*Decree for the plaintiff.*

*John Chipman Gray, (Roland Gray with him,) for the plaintiff.*

No counsel appeared for the defendants.

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VIRGILO MULTER vs. JOHN W. KNIBBS & another.

Middlesex. December 10, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Husband and Wife. Parent and Child. Alienation of Affection. Evidence. Presumptions and burden of proof.*

In an action by a husband against the father of his wife for enticing her away, alienating her affections and harboring and secreting her, it is not enough for the plaintiff to show that the defendant performed the acts charged. The burden is upon him to show that the defendant was prompted by malice in what he said and did, and to overcome the presumption that the defendant acted under the influence of natural affection and for what he believed to be the good of his child.

In an action by a husband against the father of his wife for enticing her away, alienating her affections and harboring and secreting her, if there is evidence that the defendant, while his daughter was in his care, at first denied to the plaintiff that he had any knowledge of her whereabouts, and then refused to give the plaintiff any information, saying "I don't care anything about your wishes I am running this thing now," that the defendant told one witness that he "came near kicking her out of the cellar" when he learned that she had married the plaintiff, and said that the plaintiff "couldn't see her, and that he had no right to see her," and told another witness that he was going to have his own way about this, that the plaintiff could not live with his girl, and that he would spend the last cent he had before he would consent to this man's having his daughter, that the defendant told the plaintiff's mother, when she said to him that she could not agree to the annulment of the marriage and wished there might be some reconciliation, "I don't care whether you agree to it or not, it is going as I say. You have had your way all the way through and now I want you to understand I shall have mine," and that when the plaintiff's mother said that she feared for his daughter's health he answered "Well, I don't," although the defendant introduces evidence tending strongly to show that he was actuated wholly by a desire to protect his daughter from the evils that

might follow a hasty and ill considered marriage and that his object was to secure her welfare, the question whether the defendant in what he did was actuated by malice toward the plaintiff is for the jury.

TORT by a husband against the father and mother of his wife for enticing away the plaintiff's wife and inducing her not to live with him and secreting and harboring her. Writ dated October 19, 1904.

In the Superior Court *Hitchcock*, J. ordered the jury to return a verdict for the defendants; and the plaintiff alleged exceptions.

*J. J. Shaughnessy*, (*F. P. O'Donnell*, with him,) for the plaintiff.

*E. R. Anderson*, (*A. T. Smith* with him,) for the defendants.

SHELDON, J. The verdict for the defendant Lila E. Knibbs was rightly ordered. We find no evidence that anything was done directly by her which trespassed upon the marital rights of the plaintiff; and the presumption of fact by which a husband may sometimes be held to answer for acts wrongfully done by his wife in his presence cannot be so applied as to make her responsible for any of his tortious acts.

But somewhat different considerations are applicable to the case of the male defendant.

In an action of this kind, brought by a husband against the father of his wife, upon the allegations that the defendant has enticed the plaintiff's wife away from him, alienated her affections, persuaded and induced her not to live with him, and has harbored, secreted and concealed her, it is not (as it might be in an action against a stranger) enough to show that the defendant actually has performed the acts charged, and that they have resulted in an abandonment of the plaintiff by his wife. There is a material difference between the acts of a parent and those of a mere intermeddler. Even in the latter case, a defendant may disprove any intent on his part, in advising the wife, to cause a separation, and may show that his advice was given honestly. *Tasker v. Stanley*, 153 Mass. 148. But the rights and the corresponding duties of a parent are much greater than those of a stranger; and much stronger evidence is required to maintain an action against him. It is proper for him to give to his daughter such advice and to bring such motives of





6 Ind. App. 317. But if there is evidence upon which the jury would have a right to find that the defendant has actively interfered to cause his daughter to abandon her husband, and has deprived him of her affections and of the comfort and solace of her society, and has done this from malice to the plaintiff and not for the purpose of affording proper protection to his child and furthering her true welfare, then the case must be left to the jury, with the instruction that if these facts are proved the action may be maintained. *Holtz v. Dick*, 42 Ohio St. 23. *Price v. Price*, 91 Iowa, 693. *Tucker v. Tucker*, 74 Miss. 93. *Bennett v. Smith*, 21 Barb. 439. *Williams v. Williams*, 20 Col. 51. *Railsback v. Railsback*, 12 Ind. App. 659. This was recognized by all the judges in *Hutcheson v. Peck*, 5 Johns. 196. The question accordingly is whether there was such evidence in this case.

There was evidence that the male defendant, while his daughter was in his care, at first denied to the plaintiff that he had any knowledge of her whereabouts, and then refused to give any information to the plaintiff, saying, "I don't care anything about your wishes I am running this thing now." One witness testified that the defendant said he "came near kicking her out of the cellar" when he learned that she had married the plaintiff; that the plaintiff "couldn't see her, and that he had no right to see her." Another witness testified that the defendant said he was going to have his own way about this, the plaintiff could not live with his girl, that he would spend the last cent he had before he would consent to this man's having his daughter. The plaintiff's mother testified that when she told the defendant that she could not agree to the annulment of the marriage and wished there might be some reconciliation, he answered: "I don't care whether you agree to it or not, it is going as I say. You have had your way all the way through and now I want you to understand I shall have mine"; and that when she said, "I fear for Lila's health," he answered, "Well, I don't." The jury might say that this testimony indicated that he was acting from anger and ill will to the plaintiff and not from regard to the good of his daughter. No doubt much of the testimony as to what he said and did tended strongly to show that he was actuated wholly by a desire to

protect his daughter from the evils that might follow a hasty and ill considered marriage, and that his object was to secure her welfare ; indeed, it may be that this was the weight of the testimony ; but we think that the question was for the jury.

Judgment should be entered on the verdict for the female defendant ; but as to the male defendant the entry must be

*Exceptions sustained.*

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**JULIA JAMESON, executrix, vs. BOSTON ELEVATED RAILWAY COMPANY.**

Middlesex. December 10, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Street Railway.*

In an action at common law by an executrix against a street railway company for suffering of the plaintiff's testator alleged to have been caused by injuries received while a passenger on a car of the defendant, there was evidence that the plaintiff's testator was an old man and feeble on his legs, that two days before his death he boarded a car of the defendant which "started suddenly and threw him his length and he put his hand in a woman's handbox up to his elbow," that the next day he went to his work and the day after, which was Sunday, went to church, and that when he went to bed on Sunday night he had a paralytic shock from which he died. There was medical testimony to show that the shock might have been caused by such an accident. No further explanation of the accident appeared. *Held*, that there was no evidence for the jury that the plaintiff's testator was in the exercise of due care or that the defendant was negligent, the manner in which the accident happened being left to conjecture.

LORING, J. This is an action at common law for the suffering endured by the plaintiff's testator as a result of a fall in a car of the defendant.

The plaintiff testified that the testator was an old man ; (it is stated in the plaintiff's brief that he was about sixty-seven ;) that "he showed his age the last year or two, and . . . seemed to be more feeble" ; that "he walked feebly, sort of shuffled along a little, not always, but at times" ; that "his hair was very white, he had grown quite thin . . . his clothes were loose about him."

He had a factory in Chauncy Street, Boston, and lived in

Cambridge. On the night of Friday, November 21, 1902, as he sat down to dinner in his home, he told his wife "that he boarded a car and it started suddenly and threw him his length and he put his hand in a woman's bandbox up to his elbow." "He went to his work next day and to church Sunday, and when he went to go to bed Sunday night he had a shock." This was a paralytic shock from which he died.

In describing the accident the plaintiff stated that "he said that he had just gotten in, the car started, did not say whether or not he was inside the car, nor what part of the car he was in. . . . He told her that the jerk came from the starting up of the car." The witness "did not know where the bandbox was, nor whether he fell on the floor of the car or the seat, he did not tell her. He did not describe the bandbox nor complain of having injured himself or striking himself in any way, except putting his hand through the bandbox." The plaintiff also testified that she did not "know whether his clothes showed any marks of dirt or not that evening; she did not notice them"; and that he "did not tell her whether or not he had hold of [a] strap nor tell her the number of the car, or conductor, or what sort of car it was, nor where it happened, only that it was when he was going down to the station."

An employee of the testator testified that on Saturday the testator told him that "after he got on his car at the corner of Summer and Washington, the car suddenly started and he lost his balance and fell his full length on the floor; and that while falling he thrust his arm into some one's bandbox; that he felt sort of hurt, and offered an apology, asked the woman if there was any damage done. He told me that she accepted his apology and that there was no damages done so that therefore we didn't discuss it any more."

There was corroborative testimony of a servant girl as to his statement on Friday evening, and of a doctor and an acquaintance as to his personal appearance in general. There also was medical testimony to show that the shock might have been caused by such an accident.

On this evidence the presiding judge directed the jury to return a verdict for the defendant, and the case is here on an exception to that ruling.

We are of opinion that the ruling of the presiding judge was right.

The only evidence of the circumstances under which the plaintiff's testator fell consisted of the statements made by him before he died. These statements did not go far enough to show that he was in the exercise of due care, or that the defendant's servants were negligent. All that the plaintiff proved was that in some way her testator, who was feeble on his legs, fell on the defendant's car starting apparently in the usual way, with something of a jerk. Just how the accident happened was left by the evidence to conjecture, and conjecture is 'not proof. See in this connection *Thomas v. Boston Elevated Railway*, ante, 438, and cases cited; *Crowell v. Moley*, 188 Mass. 116; *Botkin v. Miller*, 190 Mass. 411.

*Exceptions overruled.*

*H. C. Long*, for the plaintiff.

*H. Bancroft*, for the defendant, was not called upon.

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### FRANK C. STACKPOLE vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk, December 11, 1906. — January 8, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Negligence. Street Railway. Practice, Civil, Exceptions.*

If a boy eleven years of age on his way to school has occasion to cross a city street with parallel tracks on which he knows that electric cars run in both directions, and, seeing a car on the track nearer to him, waits for it to pass and then runs at a trot across the track behind this car, when he is struck and injured by a car coming from the opposite direction on the track beyond, which was concealed from his view by the first car, he is not in the exercise of due care, and cannot recover for his injuries from the corporation operating the car which struck him even if such operation was negligent.

In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the defendant, if the presiding judge orders a verdict for the defendant, and the plaintiff in a bill of exceptions states evidence by which it appears that when the injuries were incurred the plaintiff was not in the exercise of due care, his exceptions to the exclusion of evidence upon the question of the defendant's negligence are immaterial and need not be considered by this court.

TORT by a boy against a street railway company for injuries incurred by reason of the alleged negligence of the servants of the defendant on April 22, 1904, in running down the plaintiff on Cross Street in Somerville, between Oliver Street and the Edgerly School in that city, where the defendant maintained two tracks respectively for outward bound and inward bound cars. Writ dated May 18, 1904.

At the trial in the Superior Court before *Sherman, J.* the following facts appeared in regard to the conduct of the plaintiff: The plaintiff at the time of the accident was eleven years of age, and the accident happened while he was on the way from his home to his school. He was standing upon the sidewalk nearer the inward track of the defendant on Cross Street at a point opposite the end of the sidewalk of Everett Avenue, which enters Cross Street on the other side from that on which the plaintiff was standing. This point he testified also was opposite a stopping place for the defendant's inward bound cars. The plaintiff before leaving the sidewalk looked up and down Cross Street. In the direction from which the outward bound cars came he saw nothing down the street. Looking the other way he saw a team standing in the street. He saw an inward bound car on the track nearer him, and about opposite him. The plaintiff waited for this inward bound car to pass and then trotted across the street behind this car. He passed the rear end of the inward bound car and when he reached the nearer rail of the track for outward bound cars saw for the first time an outward bound car approaching him about twelve feet away coming, in his estimation, at the rate of twelve or thirteen miles per hour, which was faster than permitted by the city ordinances of Somerville. The plaintiff endeavored to draw back, but before he could escape he was struck, the lower half of his body being thrown under the fender of the car, in which position he was pushed a distance of five or six feet.

On cross-examination the plaintiff testified that at the time of the accident he had been attending this same school since the previous September, and that he used to go over this same route four times a day, and was obliged to cross the street at some point or another between Oliver Street and the school, but could cross at one place as well as another; that he was well ac-

quainted with this street all along, and knew that cars ran frequently in both directions, and had seen them many times; that upon the day of the accident, it was sunshiny weather, and that the street was straight and level, so that he could see way down to Broadway from the point where he crossed over; that he saw a car coming in town and was running alongside of it on the sidewalk. He then testified as follows: "When I was running ahead I was at the head platform, nearly, and then when I got down there I stopped to let it go by, and then I looked both ways. Q. But you didn't look both ways until you stopped to let it go by? A. No, sir. — Q. And at that time the car was between you and the car that was coming the other way? A. Yes, sir. — Q. And then you turned and attempted to cross over? A. Yes, sir. — Q. And you were running then, when you went across the street; after you had looked and started to go across, you were running? A. I wasn't running fast; I was trotting."

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant "on account of the plaintiff's lack of due care at the time of the injury." The plaintiff alleged exceptions to the ruling of the judge, and also to his exclusion of certain evidence upon the question of the defendant's negligence.

*A. L. Richards, (T. Eaton with him,)* for the plaintiff.

*J. F. Berry,* for the defendant, was not called upon.

SHELDON, J. Upon the evidence, this accident was due to the plaintiff's own negligence. He was upon the sidewalk of an open street, and started to "trot" across the street, where he knew that there were double electric railway tracks, immediately behind a car upon the track nearest to him. His view of the street was wholly unobstructed. He testified that he looked both ways before starting to cross, and did not see the car that struck him until he had got upon that track. But he was familiar with the street, accustomed to cross it four times a day, and fully understood the danger of so doing. He claimed that his view of the car that struck him was obstructed by the car upon the other track. But if so, he knew of the obstruction, and yet he chose to go across the street on a trot, so that when he became aware of the approaching car he had not time to get out of the way. It cannot be said that he was exercising such care as could be expected of one of his years, because, though aware of the danger,

he was exercising no care whatever to guard against it. If the defendant's car had been going a little faster, he would have run into its side instead of getting in front of it; but we cannot see that he is in any better case to maintain his action than he would have been in that event. He simply took a risk, and he has no right to throw the consequences upon the defendant. *Murphy v. Boston Elevated Railway*, 188 Mass. 8. *Young v. Small*, 188 Mass. 4. *Morey v. Gloucester Street Railway*, 171 Mass. 164. *Mullen v. Springfield Street Railway*, 164 Mass. 450. And see *Bartlett v. Worcester Consolidated Street Railway*, 189 Mass. 360; *Saltman v. Boston Elevated Railway*, 187 Mass. 243.

The evidence excluded could have been competent only on the question of the defendant's negligence. But as the plaintiff was not himself in the exercise of proper care, this question was immaterial, and the plaintiff was not harmed by the exclusion of the evidence. *Oak Island Hotel Co. v. Oak Island Grove Co.* 165 Mass. 260. *Sullivan v. Lowell & Dracut Street Railway*, 162 Mass. 536. Accordingly, we need not consider whether it would have been competent for any purpose. *Wolcott v. Smith*, 15 Gray, 587.

*Exceptions overruled.*

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WILLIAM I. BOWDITCH, trustee, vs. NORWICH UNION FIRE  
INSURANCE COMPANY.

Suffolk. December 11, 1906. — January 8, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Insurance, Fire. Agency. Broker. Words, "Dwelling house."*

There can be no recovery on a policy against fire insuring a building as a "dwelling house" if the building was used in part as a dwelling house and in part as a store.

In an action against a fire insurance company on a policy insuring a building as a dwelling house, which fails because the building was not a dwelling house for the purpose of insurance, having a shoe store in the basement and a dry goods store on the street floor, the facts that the insurance was procured for the plaintiff by an insurance broker, who was an agent of the defendant, and that this broker had maps in his office showing the character of the building, are imma-



terial, although the plaintiff may have a cause of action against the broker for negligence in failing to obtain for the plaintiff a valid policy when he had an opportunity of knowing the facts.

CONTRACT on a policy of fire insurance in the Massachusetts standard form for \$5,000 on "brick dwelling house" No. 328 on Harrison Avenue in Boston. Writ dated November 28, 1905.

In the Superior Court the case was submitted to *Bond, J.* upon an agreed statement of facts substantially as follows:

On November 8, 1901, the defendant delivered to the plaintiff the policy in suit, which previously had been countersigned on October 14, 1901, by one Frank Gair Macomber, a duly authorized agent of the defendant to write policies of fire insurance on property in Boston. A premium of \$25 was paid by the plaintiff to the defendant as the consideration therefor. The policy was in the Massachusetts standard form and insured the plaintiff against loss or damage by fire to the amount of \$5,000 for a term of five years on

"Brick dwelling House and Additions and Foundations, including all Piping, Plumbing and Heating Apparatus, and their Appurtenances and all Landlord's Fixtures, Yard Fixtures and Fences adjacent thereto, and on Storm Doors and Windows, Blinds, Awnings, Screen Doors and Windows, on or in the building or stored on the premises of the assured, situate No. 328 Harrison Avenue, Boston, Mass."

The premises numbered 328 Harrison Avenue, Boston, consisted of a brick building with a basement, three regular stories above the basement and an upper floor or attic under a pitched roof containing sleeping rooms. Originally this building had been used only for dwelling house purposes, but at some time before November 10, 1901, a lessee, holding under a lease from the plaintiff which gave the lessee authority to make alterations in the building, had altered the premises by tearing out the front of the first story and basement, except where there were doors, and by putting in plate glass windows instead. Thereafter the lessee leased the front room in the basement and the front room in the first story for stores.

On and after November 10 and up to the time of the fire the premises were used and occupied as follows: One family hired the whole basement and the whole of the third story, using the

front room in the basement as a second-hand shoe store, the back room in the basement for a kitchen and other living purposes, and the third story for living purposes. The first story was leased to a person who did not sleep in the building but kept a dry goods store in the front room and used the back room as a kitchen and for living purposes. The second story was occupied by a family for living purposes and one of the two rooms in the top story or attic was occupied by the lessee of the basement and third story, and another room by another person.

On June 28, 1905, a fire occurred on the premises, and in accordance with the terms of the policy the amount of loss and damage caused by the fire was submitted by the parties to referees appointed in accordance with the condition of the policy relating thereto. Thereafter on June 30, 1905, the referees awarded as the damage to the property the sum of \$1,906.

Certain other facts were agreed subject to the ruling of the court as to their admissibility. Among them were the following:

The defendant's agent, Macomber, was a duly licensed insurance broker in the city of Boston, as well as the agent of the defendant to issue policies of the defendant, and had in his office certain maps known as Sanborn maps, showing the streets and buildings in the city of Boston. These maps are issued by the Sanborn Map Company of New York, and corrections of them are issued semi-annually. An examination of the maps in Macomber's office on November 10, 1901, and of the corrections which had been issued up to that time would have shown that the premises No. 328 Harrison Avenue were occupied in part for stores. It is customary in the city of Boston for insurance brokers and insurance agents to consult such maps for the purpose of issuing policies, but no reference to these maps was made by Macomber in issuing the policy in suit. These facts were offered "for the purposes of proving that the defendant's agent Macomber ought to have known of the condition of the premises No. 328 Harrison Avenue at the time of the issuance of the policy in question."

The customary rate of premium for insurance for a term of five years upon a dwelling house with stores in it is three fourths of one per cent; the rate of premium paid by the plain-

tiff upon the policy in suit was one half of one per cent. Before suing out the writ in this action and after the fire the plaintiff tendered to the defendant \$12.50, the difference between the premium paid and the customary rate, which sum the defendant declined to receive.

The judge gave judgment for the defendant; and the plaintiff appealed.

*R. Homans*, for the plaintiff.

*F. W. Brown*, for the defendant.

LORING, J. This case is concluded by the decision of this court in *Thomas v. Commercial Union Assurance Co.* 162 Mass. 29.

If the question here had been the question of the identification of the building insured, the fact that it was described as a dwelling house would not have been material, although there was a shoe store in the basement and a dry goods store on the first floor. But the question here was not a question of identification. A building used in part as a dwelling house and in part as a store for the purposes of insurance is not a dwelling house but a different kind of building. It costs half as much again to insure it. The defendant agreed to insure the building as a dwelling house. For the purpose of insurance the building in question was not a dwelling house. No contract ever was made insuring this building as it was, — part dwelling and part store. For a case like the one at bar, in fact as well as law, see *Dougherty v. Greenwich Ins. Co.* 85 Vroom, 716.

The plaintiff has argued that he left the matter of insuring the building in question to an insurance broker who was an agent of the defendant company. It is agreed that Macomber, the broker and agent in question, had maps in his office which showed the character of the building. The fact that Macomber might have found out that the building insured was not a dwelling house, but did not find that out, may be ground for an action of negligence against him as the plaintiff's broker for making the contract which he made. The action here is on the contract which he made. In such an action this fact is immaterial. In this respect the case at bar falls short of *Thomas v. Commercial Union Assurance Co.* 162 Mass. 29, in which evidence was held rightly excluded which showed that the building was described

fully to the agent of the company when the policy was issued, on the ground that such evidence contradicted the written contract sued on.

*Judgment for the defendant affirmed.*



GEORGE N. HILL vs. MAYOR OF THE CITY OF BOSTON  
& another.

Suffolk. December 11, 1906.—January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Veteran. Civil Service. Waiver. Mandamus. Laches. Damages.*

Where a veteran, who is enrolled in the classified list of the public service and holds the office or employment of messenger in the printing department of a city, is notified in writing by the superintendent of printing that he is dismissed from the service of the city for the reason that the position filled by him no longer is necessary and should be abolished, and that he will be given a hearing at the mayor's office at a certain hour on a certain day, and the notice is received by the veteran at least seventy-two hours before the time fixed for the hearing, and he voluntarily attends and is accorded a fair hearing, he has waived the requirement of R. L. c. 19, § 23, that the notice of such a hearing shall be given by the mayor, and cannot rely on this omission to defeat the proceedings if otherwise valid.

Under R. L. c. 19, § 23, a veteran enrolled in the classified list of the public service and holding the office or employment of messenger in the printing department of a city is not removed lawfully, nor is his position abolished, if, after he has been heard in his own behalf before the mayor in accordance with the requirements of the statute, the mayor sends to the superintendent of printing this communication: "Your action in abolishing the position of messenger in the printing department is hereby approved," and the next day the superintendent sends to the veteran this notice: "The position of messenger which you are filling in this department has been abolished, and there will be no further need of your services," these communications not being equivalent to a written order signed by the mayor stating the cause for such abolition which is required by the statute after such a hearing.

On a petition for a writ of mandamus the question whether the petitioner so unreasonably has neglected to enforce his right that the court will deny him the remedy must depend upon the circumstances of each particular case.

At the trial of a petition, by a veteran enrolled in the classified list of the public service and holding the office or employment of messenger in the printing department of a city, for a writ of mandamus commanding the mayor and the superintendent of the printing department to recognize the petitioner as the messenger of that department and to place his name on the pay roll of the city as such messenger, it appeared that immediately after the plaintiff was notified orally of the abolition of his position and his discharge from employment he

retained counsel who thereafter acted for him, but that owing to poverty he could not furnish money to prosecute his case until two years after his discharge, when he brought an action of contract against the city for arrears of salary, and, this action having been terminated by the presiding judge ordering a verdict for the defendant, he thereupon brought his petition for the writ of mandamus. In that proceeding the justice who heard the case found as facts that the petitioner never abandoned his claim that he had been removed from office unlawfully, and that he was advised that his action for salary was the proper remedy to test this question. *Held*, that under the circumstances the delay of two years before bringing the action of contract could not be said to be such an acquiescence by him in his dismissal as to require the court to deny him the writ of mandamus.

On a petition by a veteran for a writ of mandamus addressed to the mayor and the superintendent of the printing department of a city, to compel the reinstatement of the petitioner as messenger of the printing department, from which two years before he had been removed unlawfully contrary to the provisions of R. L. c. 19, § 23, if the petitioner prevails and the writ is to issue, although under R. L. c. 192, § 5, the petitioner cannot recover arrears of salary or damages for his unlawful ouster, he can recover any damages which are shown to be the proximate result of the wrongful answer of the respondents, but in this case such damages would be only nominal, as upon restoration to his position as messenger the petitioner would become entitled to the accrued emoluments of the position during the entire period of his exclusion if found to have been able and willing to perform its duties.

PETITION, filed December 5, 1905, for a writ of mandamus addressed to the mayor and the superintendent of the printing department of the city of Boston commanding them to recognize the petitioner as the messenger of such printing department and to place his name upon the pay roll of the city as such messenger.

The case was heard by *Braley, J.*, who reported it for determination by the full court as follows:

In this case, upon the evidence I find that on March 21, 1900, the petitioner, as a veteran of the civil war, was enrolled in the classified list of the public service of the Commonwealth under the provisions of R. L. c. 19, §§ 20-25. On December 21, 1901, one Monahan, then superintendent of printing for the city of Boston, made a requisition upon the civil service commissioners for the Commonwealth, requesting the certification of the petitioner as a veteran, to fill the office of messenger in the printing department at a salary of \$13.50 per week, and on that date the petitioner was appointed a messenger in that department at the salary named, and entered upon the discharge of his duties. No other classification of the nature of the service that the peti-

tioner was to render appeared on the records of the commissioners. During the time that the petitioner performed this service no complaint was made that he was incompetent or unfaithful, or that he was not of good habits. Upon February 17, 1902, in consequence of information which the petitioner had received from the foreman in the department, he saw one Whalen, who, in 1902, had succeeded Monahan as superintendent, when this conversation took place: "Mr. Casey tells me I am suspended. I am a veteran and cannot be suspended in this way." Whalen replied, "I know you are a veteran. Come in and see me day after to-morrow." At the subsequent interview, the exact date of which did not appear, Whalen said to the petitioner, "I can do nothing for you"; to which the petitioner replied, "It is a finable offence to suspend me in this way," and Whalen then said, "Then I will abolish your office." On February 24, 1902, the petitioner wrote to the mayor of the city, in substance as follows: "Being a veteran and properly certified from the civil service commissioners I respectfully ask a redress of grievances caused by the action of superintendent Thomas A. Whalen of the printing department in removing my name from the position of messenger on Feb. 17th. . . . Sec. 23, Ch. 19 of the Rev. Laws is the statute that has been violated in this case." He received a reply from the mayor, dated February 26, 1902, acknowledging the letter, and stating that "the matter will receive my attention." On February 27, 1902, he was notified in writing by the superintendent, as follows: "You are to be dismissed from the service of the city for the reason that the place and position filled by you is no longer necessary, that it should be abolished, and your services are no longer required. If you are entitled to a hearing under the provisions of Sec. 23, Ch. 19 of Rev. Laws, you will be given such hearing at the Mayor's Office, Boston, at three o'clock P. M. March 3, 1902." This notice was received at least seventy-two hours before the time fixed for the hearing. At the time appointed the petitioner, accompanied by counsel, and the superintendent attended. I am satisfied that a hearing then took place at which the claim of the petitioner and the facts in connection with his case were presented. Whatever decision was reached by the mayor it was not communicated by him in any way to the petitioner, but on March 12, 1902, the

superintendent of printing received from the mayor this communication: "Your action in abolishing the position of messenger in the printing department is hereby approved," and on March 18, 1902, the petitioner received from Whalen this notice: "The position of messenger which you are filling in this department has been abolished, and there will be no further need of your services. By calling at the treasurer's office you can collect your salary up to the close of the business day." It did not appear that the mayor ever took any other or further action in connection with the matter. I further find that the petitioner, after he was orally notified of his suspension, retained counsel, who since has acted for him, but, owing to poverty, he could not furnish money to prosecute his case after the hearing before the mayor until some time in March, 1904, when an action was brought in the Municipal Court of the City of Boston to recover alleged arrears of salary. This action, on appeal to the Superior Court, was terminated by a verdict being ordered in favor of the defendant. Thereupon, under the advice of other counsel, the present petition, filed December 5, 1905, was seasonably brought. As a matter of fact I am satisfied that the petitioner never abandoned his claim that he had been unlawfully removed from office, and after putting his case in the hands of counsel expected him to go forward as soon as money for the meeting of necessary expenses had been received, and that he was advised that the proper remedy was to sue for "back salary," and that he understood that such an action could be brought at any time "when I got the means" and this time arrived "when his son got into a position where he had some money to advance," and thereupon the action for salary was brought.

At the request and by consent of the parties, the case, upon the pleadings and these findings, is reported to the full court. If the office held by the petitioner was abolished lawfully under R. L. c. 19, § 23, or if the petitioner has been guilty of such unreasonable delay as ought to bar relief by mandamus, the petition is to be dismissed; otherwise, the writ is to issue, with such further order, if any, as the court may direct.

*C. W. Bartlett & A. T. Smith, (S. F. Keyes with them,) for the petitioner.*

*S. M. Child, for the respondents.*

BRALEY, J. Unless the office held by the petitioner was lawfully abolished, or he has been guilty of unreasonable delay, he is entitled to relief by mandamus. *Keough v. Aldermen of Holyoke*, 156 Mass. 403. *Ransom v. Mayor of Boston*, ante, 537. It was the purpose of R. L. c. 19, § 23, to protect a veteran holding office in the public service from capricious or arbitrary removal in whatever form the attempt might be made. If he becomes incapacitated, or his office or employment ceases to be necessary in the proper administration of the department with which he is connected, he can neither be removed nor his office abolished without first giving to him a statement of the reasons for the proposed change, and an opportunity for a full hearing. In cities this power is vested in the mayor before whom the hearing takes place, and the statement of reasons as well as the written notice must issue from the tribunal which alone is authorized to pass upon the inquiry. But a technical compliance with these requirements can be waived, and while the act of the superintendent in giving the notice and stating the reasons although presumably done with the knowledge and assent of the mayor did not comply with the statute, yet the petitioner was not misled, and having voluntarily attended with counsel, and been accorded a fair hearing, he cannot rely on this omission to defeat the proceedings if otherwise valid. *Streeter v. Worcester*, 177 Mass. 29, 31. The statute, however, is not satisfied, nor can there be a valid removal or abolition of the office unless after the hearing, if the decision is adverse, a written order reciting the cause or causes on which such action is founded has been signed by the mayor, whose action is final and not subject to review if as matter of law the reasons given are sufficient. *Ayers v. Hatch*, 175 Mass. 489, 492. *Hogan v. Collins*, 188 Mass. 43, 46. To him alone is given the power of decision, and this duty cannot be delegated. *Commonwealth v. Smith*, 141 Mass. 135, 140. At the completion of the hearing, if any decision was thereafter rendered, it was not communicated by the mayor to the petitioner, nor if a broad construction is given to his letter to the superintendent can this communication be construed as a written order abolishing the office with a specific statement of the reasons. Because of this failure to comply with the plain provisions of law the notice given by the superin-



tendent that the petitioner's office had ceased to exist was a nullity.

But the granting of the writ being discretionary the remedy is barred if the petitioner unreasonably neglected to enforce his right. *Waldron v. Lee*, 5 Pick. 323. *Hill v. County Commissioners*, 4 Gray, 414. *Murray v. Stevens*, 110 Mass. 95. *J. H. Wentworth Co. v. French*, 176 Mass. 442. *Streeter v. Worcester*, *ubi supra*. No precise definition can be formulated as to what is sufficient to constitute such want of diligence, but at law, upon a petition for mandamus, as well as upon a bill for equitable relief, this question must depend upon the circumstances of each particular case. *Snow v. Boston Blank Book Manuf. Co.* 153 Mass. 456, 458. *J. H. Wentworth Co. v. French*, *ubi supra*. *Hayward v. Eliot National Bank*, 96 U. S. 611. The mere lapse of time since the right of action accrued is important, but not absolutely decisive, although if the equitable claim is analogous to a legal right which is controlled by a statute of limitations equity will apply the same limit within which an action must be begun. *Broadway National Bank v. Baker*, 176 Mass. 294. *Sunter v. Sunter*, 190 Mass. 449, 456. In commencing and prosecuting an action at law which was inadequate to restore him to office the petitioner did not lose his present remedy because both were not concurrently instituted, for it is found by the report that there was no intentional waiver, nor abandonment of the claim that he had been unlawfully deposed. *Blake v. Traders' National Bank*, 145 Mass. 13, 17. *People v. State Treasurer*, 24 Mich. 468. He promptly engaged counsel and acted under their advice, and while his poverty alone might not relieve him from negligence, he was informed that a suit might be brought whenever he obtained the pecuniary means. *Hayward v. Eliot National Bank*, *ubi supra*. After the action at law was begun in which he was advised that the legality of the mayor's action could be determined, the petitioner has been diligent, and the delay of two years before bringing that action cannot under the circumstances be said to constitute such acquiescence by him in his dismissal as to require us to deny appropriate relief. *Pope v. Leonard*, 115 Mass. 286, 291. *Morse v. Hill*, 136 Mass. 60, 66. *Wood v. Westborough*, 140 Mass. 403. *Ransom v. Mayor of Boston*, *ubi supra*.

The petitioner also asks that damages may be assessed. In proceedings in mandamus at common law the return could not be traversed, and, if sufficient in law, judgment followed for the defendant, and the only remedy of the relator was an action on the case for making in fact a false return. *Howard v. Gage*, 6 Mass. 462. *Lunt v. Davison*, 104 Mass. 498. *Tucker v. Justices of Iredell County*, 13 Ired. 434, 46 N. C. 451, 459. This action however was abolished by the St. of 1852, c. 312, § 38; subsequently Gen. Sta. c. 145, § 13; Pub. Sta. c. 186, § 14; and upon the return to the alternative writ, if the material facts were denied by an answer and the issue maintained, damages were to be assessed, and judgment therefor entered in favor of the person "suing the writ." But this is only a substitution, and means that if the petitioner prevails he recovers such damages only as were recoverable in an action for a false return. The R. L. c. 192, § 5, made changes bringing the statute into harmony with the practice which under the St. of 1851, c. 233, § 50, had gradually been adopted by this court, and instead of the alternative writ and return an answer to the petition is substituted, and the proceedings simplified. The provisions as to the pleadings are in uniformity with other remedial processes at law, as the case is heard and decided upon the petition and answer, with such further pleadings, if any, as may be necessary. Report of Commissioners on Pub. Sta. c. 192 n. *McCarthy v. Street Commissioners*, 188 Mass. 338, 340.

In the present case the petition and answer fully cover the merits of the controversy, and while the respondents have been found unable to justify, the statute does not confer the right to recover arrears of salary, even if the petitioner had been their servant, or damages for his unlawful ouster, as this process does not lie to enforce a personal liability either in contract or tort for which other adequate remedies are provided. *Morse, petitioner*, 18 Pick. 443, 446, 447. *La Grange v. State Treasurer*, 24 Mich. 468, 476. Yet he can recover damages which are shown to be the proximate result of their wrongful answer, and the loss of salary during the period which has elapsed since the bringing of the petition, while not decisive, ordinarily could be considered in fixing a just measure of compensation. See *Johnson v. Walker*, 155 Mass. 253, 254; *People v. Supervisors*

of *Richmond*, 28 N. Y. 112; *People v. Musical Protective Union*, 118 N. Y. 101; *Marion Beneficial Society v. Commonwealth*, 31 Penn. St. 82; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Penn. St. 204; *People v. Morton*, 24 App. Div. (N. Y.) 563. But upon restoration to office, since he becomes entitled to the accrued emoluments during the entire period if found to have been able and willing to perform its duties, he can recover only nominal damages in this proceeding. *Ransom v. Mayor of Boston*, ante, 587.

By the terms of the report these damages are to be assessed by a single justice, and judgment is to be entered for the amount with costs, and for a peremptory writ of mandamus restoring him to his office.

*So ordered.*

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**BESSIE K. NATHAN vs. DANIEL T. S. LELAND.**

Suffolk. December 12, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Frauds, Statute of. Bankruptcy. Contract, Performance and breach.*

Under R. L. c. 74, § 3, a plaintiff can recover on a new promise to pay a debt barred by a discharge in bankruptcy only by showing a definite and unequivocal promise in writing to pay such debt signed by or in behalf of the defendant. Expressions of a willingness to pay and of an expectation of financial ability to make payments on the debt are not sufficient.

The expressions in a letter written and signed by a bankrupt "I shall be able to make you a voluntary payment of at least \$5 per month and I hope after six months time to be able to increase the amount. . . I have so arranged matters with my assignee that there will be nothing to prevent my regular payment of \$5 per month on old account," contain no absolute promise to pay a debt barred by the writer's discharge in bankruptcy sufficient to satisfy the requirement of R. L. c. 74, § 3.

A letter written and signed by a bankrupt in which he writes "I am sorry to say to you that the payments on your former account I shall not be able to make immediately as I wished to do," and says at the close "You are not to regard yourself as in any danger of losing the amount, as long as I hold my present position, because I have promised in time to take care of it, but I must have time to do it, as it will be done as fast as resources will allow" contains a distinct and unqualified promise to pay by instalments a debt barred by the writer's discharge in bankruptcy sufficient to satisfy the requirement of R. L. c. 74, § 3.

The plaintiff in an action of contract upon a new promise of the defendant to pay by instalments a debt barred by the defendant's discharge in bankruptcy, if he proves such a promise in writing signed by the defendant sufficient to satisfy the requirement of R. L. c. 74, § 8, can recover only the instalments of the debt which in accordance with the new promise of the defendant were payable at the date of the writ.

CONTRACT, the first count on an account annexed for \$118.75 and interest thereon, and the second count alleging that the defendant purchased clothes and jewelry from the plaintiff according to the account annexed, that on August 9, 1902, the defendant was adjudicated a bankrupt and thereafter was discharged, and that on August 27, 1903, and at subsequent times the defendant promised in writing to pay said indebtedness in payments of not less than \$5 a month. Writ dated December 14, 1904.

The defendant's answer contained a general denial and pleaded the defendant's discharge in bankruptcy.

In the Superior Court the case was tried before *Sherman, J.*, without a jury.

It appeared in evidence that the defendant before August, 1902, was indebted to the plaintiff in substantially the sum of \$200 for various purchases of merchandise of a personal nature such as clothes and jewelry upon an open account; that on August 9, 1902, the defendant was adjudicated a bankrupt in the United States District Court for the District of Massachusetts; that the plaintiff was set forth in the schedule of the defendant's creditors as a creditor upon an open account, and that the plaintiff as such creditor had sufficient notice of the bankruptcy of the defendant; that on August 8, 1903, the defendant received his discharge in bankruptcy; that some time in October, 1902, the defendant entered into a new contract with the plaintiff for the purchase of goods and merchandise amounting in purchase price to \$60.50; that the defendant agreed to pay such contract price in equal monthly instalments of \$5 each; that at the time of entering into the contract the defendant signed certain papers which are not material to the present issue; that at the time he had a conversation with some representative of the plaintiff in relation to the new account of \$60.50 and that the plaintiff's representative informed the defendant

that credit would not be given to him unless he agreed to pay up the indebtedness which had been barred by bankruptcy proceedings; that thereupon the defendant did agree orally to pay up the indebtedness barred by the bankruptcy proceedings; that the defendant made regular monthly payments upon the sixty dollar contract, so called, until he had paid the sum of \$55 and thereupon ceased, the defendant assuming and believing that the original contract price was \$55 instead of \$65.50.

It was admitted that the account which was the basis of the present action was for the entire amount owed by the defendant to the plaintiff including the amount barred by the bankruptcy proceedings together with the amount of the new contract, \$60.50, or a total of \$245.20 with a credit for the \$55 paid by the defendant.

The defendant wrote the plaintiff certain letters, the material parts of which were attached to the bill of exceptions and marked Exhibit A. There was no evidence of any letters from the plaintiff to the defendant replying to the letters marked Exhibit A except what appears in the letters, but there were conversations assenting to the arrangement referred to in the letters.

At the close of the evidence the defendant, admitting that he was liable to the extent of \$5.50 and no more, asked the judge to rule as follows:

"1. That upon all the evidence the defendant is entitled to a verdict.

"2. That no promise has been made by the defendant to pay the debt of the plaintiff barred by bankruptcy proceedings, in clear, expressed, unequivocal and unqualified language.

"3. That no promise of the payment of the debt claimed by the plaintiff was made by the defendant that would comply with R. L. c. 74, § 3.

"4. That in the event of the court finding that such promise was made by the defendant to the plaintiff as required by R. L. c. 74, § 3, to avoid bankruptcy proceedings, then the plaintiff can recover only \$5 a month for a period of nineteen months."

The judge refused the first, second and third requests of the defendant and made the fourth ruling as requested by him.

He found for the plaintiff in the sum of \$103; and the defendant alleged exceptions.

It was agreed by the parties, as a part of the bill of exceptions, that if the rulings of the judge were right, judgment should be entered on the findings; otherwise, that judgment should be entered for the plaintiff in the sum of \$5.50, or such judgment should be entered as law and justice might require.

Exhibit A contained the following extracts from letters signed by the defendant:

Letter mailed to Nathan and Hurst, dated February 5, 1903:

"The reason of my failing to make my usual payment this month is that I was obliged to close up a note on which I have been making larger (for me) instalments. There will, after this, to the best of my belief, be no interruptions or hindrance to paying regularly every month, in fact, I am getting fairly well straightened out, having, I trust, got through the worst."

Letter mailed to Nathan and Hurst dated August 27, 1903:

"I have just received notice that the Court of Bankruptcy has been pleased to grant my discharge in bankruptcy, and by this act I am relieved of further responsibility in the matter of the claims against me mentioned in my schedule. I have succeeded during the past year in settling about \$900 worth of secured notes, and still have about \$800 more for which ample time is to be given me.

"About other unsecured claims, my resources for the coming year will not allow me to hold out any prospect of payment except in your case; I shall be able to make you a voluntary payment of at least \$5 per month and I hope after six months time to be able to increase the amount.

"What with settling up with my lawyer and adjusting matters with my assignee, I have no funds left over this month, and shall have to omit one payment, but only for this time.

"Commencing with next month, I have so arranged matters with my assignee that there will be nothing to prevent my regular payment of \$5 per month on old account. All my other unsecured creditors will have to wait developments."

Letter mailed Nathan and Hurst dated December 8, 1903:

"I am sorry to say to you that the payments on your former

account I shall not be able to make immediately as I wished to do, until I have got rid of certain notes which my salary is held as security for.

"During the past 15 months, since my affairs went into the hands of the Court, I have been able to pay (including Court expenses and legal fees) obligations amounting close to \$1000. This has been done out of an income of \$1700 for the 15 months and has thus left me less than \$500 per annum to live on and pay expenses in order to earn my pay and do my work. Under these circumstances, I must have time on those accounts which are not secured. When you come to see that I have had less than \$10 per month (and sometimes not that) to put in my pocket for ordinary current expenses, you will see how impossible it is for me to pay anything now and retain enough to keep me working. I have just paid a note of \$100 and have two others to attend to during the next five months. When these are paid, and my salary reverts to my possession, I shall be in a position to say what I can do for you.

"No one regrets more than I do that I cannot do as I desired and proposed, but I cannot do the impossible.

"Mr. Jennings, my counsel, will inform you, if you see him, of what I have accomplished and what I can in the future do. You are not to regard yourself as in any danger of losing the amount, as long as I hold my present position, because I have promised in time to take care of it, but I must have time to do it, as it will be done as fast as resources will allow."

Letter mailed to Nathan and Hurst, dated April 16, 1904:

"Yours at hand. I am sorry that you are hit by the Union Trust and hope that it is only temporary. A reference to the morning's Herald will show you that I am in a small matter of litigation in the Superior Court which while not serious permanently, is still expensive. I had calculated to do something for you in the Fall, when I should be somewhat free from present pressure, but until this matter is settled I do not feel able to do anything.

"I shall not keep you waiting a moment longer than I can possibly help."

*M. L. Jennings*, for the defendant.

*W. H. Brown*, for the plaintiff.

BRALEY, J. Before the enactment of the original St. of 1856, c. 18, which by re-enactment is now embodied in R. L. c. 74, § 3, the oral evidence that the defendant unreservedly agreed to pay the indebtedness as a means of obtaining further credit despite the proceedings in bankruptcy, would have been sufficient to establish the plaintiff's claim. *Pratt v. Russell*, 7 Cush. 462. *United Society v. Winkley*, 7 Gray, 460. The object of the statute is, that by substituting a written for an oral promise, debtors might be relieved from being harassed by vexatious litigation, based on an effort to establish a continuing liability solely by conversations between the interested parties where on one side an attempt was made to hold the debtor notwithstanding his discharge as on a new promise by which he waived its benefit, and on the other to show that beyond a recognition by him of a moral obligation, and a willingness to pay his debt in full, nothing further was understood or undertaken. But before as well as since the statute, to revive a liability which otherwise had been legally discharged, the promise must be definite and unequivocal, and however strongly expressed neither an intention to pay old debts, nor a part payment on account are of themselves sufficient. A promise may be given after the bankruptcy proceedings are instituted, and is enforceable although subsequently a discharge is obtained. *Lerow v. Wilmarth*, 7 Allen, 463. *Merriam v. Bayley*, 1 Cush. 77. *United Society v. Winkley*, *ubi supra*. *Jacobs v. Carpenter*, 161 Mass. 16, 20, and cases cited. *Heim v. Chapman*, 171 Mass. 347. But having obtained a discharge the defendant was relieved from any further liability on a debt which was provable, unless his letters contained a definite agreement to pay the amount. The first two letters and the fourth while expressing a willingness and an expectation of financial ability to make payments contain no expression of an absolute undertaking, although the second contains a statement that if certain arrangements result as anticipated there "will be nothing to prevent my regular payment . . . on old account." If by implication this phrase refers to an oral promise it is not of itself a promise in writing. But the third letter after again referring to his pecuniary efforts, and ability to make payments, distinctly says at the close, "you are not to regard yourself as in any danger of losing the amount, as long as I hold my present



position, because I have promised in time to take care of it, but I must have time to do it, as it will be done as fast as resources will allow." As the statute does not extend beyond the requirement of evidence of a continuing promise in some writing signed by the debtor or by his authority, no precise form of statement is necessary, and the intention and obligation of the debtor must be gathered from the phraseology he chooses to use. By the language employed the defendant stated positively that he had undertaken and then undertook to liquidate the debt, and as this acknowledgment constitutes a distinct and unqualified promise his first, second and third requests for rulings were refused rightly. *Cook v. Shearman*, 103 Mass. 21. *Bigelow v. Norris*, 139 Mass. 12, 13. *Custy v. Donlan*, 159 Mass. 245, 246. *Champion v. Buckingham*, 165 Mass. 76, 79.

In promising to pay the remainder by monthly payments the measure of the defendant's liability was not diminished although as the court correctly ruled in accordance with his fourth request only the instalments which were in arrears at the date of the writ could be recovered. *Gillingham v. Brown*, 178 Mass. 417, 422.

The exceptions must be overruled, and in accordance with the agreement of the parties judgment is to be entered for the plaintiff on the finding.

*So ordered.*

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FRANKLIN I. SMITH vs. OTIS KIMBALL & another.

Suffolk. December 11, 12, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Agency. Broker. Contract.*

In an action by a real estate broker for a commission on a sale of real estate belonging to the defendant alleged to have been effected by his services, it appeared that the plaintiff had introduced himself to the defendant as a broker who might sell the property for him, that subsequently he saw the son of one L. and thus obtained certain tentative offers for the property which were supposed by the plaintiff to be in behalf of L., who always was referred to by the plaintiff and L.'s son as the son's client, that the plaintiff himself never met L.

and that the highest price thus authorized or named was \$175,000, that the plaintiff submitted to the defendant a "tentative proposition" of \$180,000, which was refused, the defendant naming \$185,000 as his price, that the defendant said to the plaintiff "Bring me an offer in writing, and perhaps we can get together," that about this time the defendant told the plaintiff that unless his clients hurried and got around within two or three weeks the negotiations would be off, that the plaintiff told the son of L. that his client would have to hurry if he was going to purchase the property, and that if anything was going to be done it would have to be done within two or three weeks, that afterwards L.'s son told the plaintiff that he had submitted the matter to his client and had no definite information, and the plaintiff thought that L. and his son had let the matter drop, that the two or three weeks mentioned by the defendant expired, and that shortly after this L. through a person other than the plaintiff procured an introduction to the defendant and they agreed upon a price of \$182,500 for the property, which L. purchased from the defendant for that sum. The defendant never had known that the offers reported by the plaintiff had come in any way from L. *Held*, that a verdict rightly was ordered for the defendant; that the only contract that could be found on the part of the defendant was to pay the plaintiff a commission if he procured a sale of the property, that the plaintiff failed to do this, and was discharged by the defendant, and that there was no possible question of the defendant's good faith in terminating the plaintiff's employment and afterwards selling the property to L., as the defendant did not know that L. had been the plaintiff's customer.

CONTRACT by a real estate broker for \$1,825 as a commission on the sale of certain real estate, belonging to the defendant Caroline S. Kimball numbered 1511 to 1525 on Washington Street in Boston and known as the Hotel Sanford, alleged to have been effected by the services of the plaintiff. Writ in the Municipal Court of the City of Boston dated August 19, 1904.

On appeal to the Superior Court the case was tried before *Harris, J.*, who at the close of the plaintiff's evidence ordered a verdict for the defendants. The plaintiff alleged exceptions.

*S. D. Elmore*, for the plaintiff.

*S. C. Brackett*, for the defendants.

SHELDON, J. Taking the most favorable view of the evidence for the plaintiff, the jury might have found that he, having learned in the autumn of 1902 that the Hotel Sanford might be bought, called upon the defendant Otis Kimball, who it is admitted had full authority to act for the other defendant, introduced himself as a real estate broker, and said that he thought he might sell the property for Mr. Kimball. He subsequently talked about the property with one W. G. Lincoln, who represented a possible purchaser, Alfred V. Lincoln, and obtained some tentative offers from him, though never himself meeting

Alfred V. Lincoln, nor even knowing except by his own inference who the prospective purchaser was. These tentative offers, or casual offers, as they were called, he communicated to Mr. Kimball, and got from him information about the property, its rentals and expenses, and obtained first one price and then other lower prices for the property, and communicated these to W. G. Lincoln. These negotiations continued until the summer of 1903. In the autumn of 1903 they were resumed. The plaintiff submitted to Mr. Kimball a "tentative proposition" of \$180,000 for the property in behalf of the proposed purchaser, and received from Mr. Kimball a proposed price of \$185,000; but no agreement was reached, and no nearer approach to a completed sale ever was made through the plaintiff. Mr. Kimball said to the plaintiff, "Bring me an offer in writing, and perhaps we can get together." The plaintiff told this to W. G. Lincoln about the middle of November, and said that his clients would have to hurry if they were going to purchase the property; that if there was anything going to be done it would have to be done within two or three weeks; and W. G. Lincoln said that he would tell his client. The prospective purchaser always was spoken of between the plaintiff and W. G. Lincoln as the latter's client. Afterwards W. G. Lincoln told the plaintiff that he had submitted the matter to his client, but had no definite information; and the plaintiff testified that so far as he knew the Lincolns seemed inclined to let the matter drop there. Some time in the autumn of 1903, apparently either early in November or two or three weeks before the property actually was sold, Mr. Kimball said to the plaintiff: "Mr. Smith, if you are going to do anything with your client, you will have to get right at it, because in two or three weeks my suit for damages against the elevated will come up and then the matter will be off, and we can't do any business." At one place in his testimony the plaintiff said that this was just before the actual conveyance of the property; but the circumstances all show that he did not mean by this that the time named by Mr. Kimball had not expired before the sale, nor is this alleged in argument. On cross-examination he stated that after Kimball told him that unless his clients hurried and got around within two or three weeks the negotiations would be off, his client did not come around

through him, and that he was not the one who completed the negotiations. He also said in one part of his testimony that his purchaser never was able to give a definite price, and in another part, that he had a definite offer of \$175,000; but nothing ever came of any such offer.

In this state of affairs, Alfred V. Lincoln procured one Mr. Wilson, a former employer of his, to introduce him to Mr. Kimball, and they agreed upon a price of \$182,500 for the property. It was conveyed to A. V. Lincoln by the defendants, for that price, on December 18, 1903. The purchaser and the seller each gave to Wilson \$500.

The only agreement that could be found to have been made between the plaintiff and the defendants was that the former should have a commission if he procured a sale for the latter. On the evidence, he had wholly failed to do so, and had been discharged by Mr. Kimball. After his failure, through the purchaser's own efforts, Mr. Kimball not knowing who the plaintiff's customer was, the parties met and themselves agreed upon the terms of a sale. *Leonard v. Eldridge*, 184 Mass. 594. The negotiations between the plaintiff and the Lincolns had come to an end; in the language used by the plaintiff in testifying, "they evidently seemed inclined to let the matter drop so far as he knew." There had been no general, and far less any exclusive employment of the plaintiff by the defendants. They had full right to make sale of this property to any one whom they pleased, regardless of what efforts the plaintiff might have made; nor can the plaintiff in such a case recover anything for his unsuccessful efforts. *Cadigan v. Crabtree*, 179 Mass. 474. The fact that the plaintiff had failed to persuade the purchaser to take the property at one price, is not of itself evidence which would justify a finding that his services were the operating and efficient cause of a subsequent sale at a somewhat lower price which yet was higher than the plaintiff had succeeded in obtaining. Nor is there any question possible as to the defendants' right to terminate the plaintiff's employment. They could have done this, acting in good faith, even if they had known who the plaintiff's customer was, and then had proceeded to deal with him themselves. *Cadigan v. Crabtree*, 179 Mass. 474; *S. C.* 186 Mass. 7.

There is no ground on which it can be said that the defendants in throwing over the plaintiff and themselves dealing directly with A. V. Lincoln acted in bad faith within the rule of *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, as quoted in *Cadigan v. Crabtree*, 186 Mass. 7, 13. *French v. McKay*, 181 Mass. 485. *Dowling v. Morrill*, 165 Mass. 491. They could not have intended to deprive the plaintiff of his commission; for they did not know that Lincoln had been his customer.

We have said nothing about the contention of the defendants that the purchase really was made in the interest of the Boston Elevated Railway Company; for we agree with the counsel for the plaintiff that the ordering of a verdict cannot be supported on this ground.

The Superior Court rightly ruled that on the evidence the plaintiff was not entitled to recover.

*Exceptions overruled.*

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### GEORGE C. CORCORAN vs. CITY OF BOSTON.

Suffolk. December 12, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Tax, Exemption. Commonwealth Flats. Landlord and Tenant. Words, "Leased."*

St. 1904, c. 385, providing that lands of the Commonwealth in that part of Boston called South Boston known as the Commonwealth Flats "shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof," does not apply to land occupied under a bond for a deed from the Commonwealth by one who carries on business there, and such land is exempt from taxation.

PETITION, filed February 21, 1906, under R. L. c. 12, § 78, for the abatement of a tax of \$315.20 assessed on May 1, 1905, on a parcel of land, in that part of the city of Boston known as South Boston, which at the time of the assessment was a part of the Commonwealth Flats, so called, owned by the Commonwealth, and upon which the petitioner had erected a manufacturing establishment and was carrying on business as a manufacturer, holding the land under a bond for a deed from

the Commonwealth, upon which the petitioner had paid all but the last instalment.

In the Superior Court the case was submitted to *Pierce, J.* upon an agreed statement of facts. He found for the petitioner in the sum of \$328.48; and the respondent appealed.

*S. M. Child*, for the respondent.

*C. E. Hellier*, for the petitioner.

*SHELDON, J.* It is settled by the decision in *Corcoran v. Boston*, 185 Mass. 325, that the land occupied by the petitioner under a bond for a deed from the Commonwealth is exempt from taxation unless the exemption has been taken away by St. 1904, c. 385. That statute provides that certain lands of the Commonwealth, including the land now occupied by the petitioner, "shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof, respectively, in the same manner as the lands and buildings thereon would be taxed to such lessees if they were the owners of the fee." The respondent contends that the petitioner, being in occupation of the land under a contract for a deed, is in the position of a tenant at will, (*Lyon v. Cunningham*, 136 Mass. 532, 537, *Gould v. Thompson*, 4 Met. 224,) and accordingly that the land thus occupied by him must be regarded as leased land within the meaning of St. 1904, c. 385; that it was the intention of the Legislature to subject to taxation all land included in the Commonwealth flats in which the Commonwealth had parted with an interest, and which was used for business purposes.

In our opinion this construction cannot be supported. It is only when actually leased for business purposes that these lands become taxable. Then they are indeed to be taxed to their full value in fee simple; *Boston Molasses Co. v. Commonwealth*, ante, 387; but until that time they continue to be exempt from taxation. And while it is true that one in possession of land under a contract for a deed may under special circumstances have some of the rights and may be subject to some of the liabilities of a tenant, his interest cannot accurately be described as that of a lessee. *Kiernan v. Linnehan*, 151 Mass. 543, in which Allen, J. said, speaking of such an occupant: "In the recent case of *Lyon v. Cunningham*, 136 Mass. 532, it was explained that, though such a person's right is not greater than

that of a tenant at will, and though he is therefore often called a tenant at will, yet he is not to be regarded as a lessee for all purposes." There was no relation of landlord and tenant between the Commonwealth and the petitioner. *Dolittle v. Eddy*, 7 Barb. 74, 78. The statute provides that the payment of the tax is not to be enforced by a sale of the lands themselves in the usual manner, but by "a sale of the leasehold interest therein and of the buildings thereon." St. 1904, c. 385. This would indicate that the land was to be taxed only where a leasehold interest existed, or, in the preceding words of the statute, where the land had been "leased for building purposes."

In our opinion the petitioner was not liable to be taxed for this land, and the judgment entered in his favor by the Superior Court must be .

*Affirmed.*

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LEMUEL E. DEMELMAN vs. CHARLES G. BRAZIER & another.

Suffolk, December 12, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Bills and Notes. Evidence, Presumptions and burden of proof, Proof of foreign laws.*

There is no presumption that the laws of New York contain statutory provisions similar to those of R. L. c. 73, § 103, in regard to days of grace for negotiable instruments, and, in the absence of evidence on the subject, the law of New York will be presumed to be the same as the common law of this Commonwealth before the enactment of St. 1896, c. 496.

Under R. L. c. 175, § 77, providing that "the existence, tenor or effect of all foreign laws may be proved as facts by parol evidence," the plaintiff in an action against the indorser of a promissory note which is governed by the law of New York may prove by his own answers on cross-examination, received without objection, that the note sued upon was presentable and payable on the day of its protest, which was without allowance for days of grace, although otherwise there is no evidence that days of grace had been abolished by statute in New York.

CONTRACT against the indorsers of two promissory notes, each for the sum of \$2,500, dated at Watertown in the State of New York on March 29, 1905, and payable four months after date at the Liberty National Bank in the city of New York. Writ against Charles G. Brazier dated August 1, 1905, and a supplemental writ issued by order of court against George I. Robinson and others as co-defendants dated November 9, 1905.

At the trial in the Superior Court before *Flaherty*, J. the plaintiff, a resident of Boston and not a lawyer, produced the notes sued upon with the notary's certificate of protest attached thereto, showing that payment was demanded and refused at the Liberty National Bank in the city of New York on July 31, 1905. The plaintiff testified that he had bought the notes for value in due course, and that he was ignorant of any infirmity in them. He was asked by his counsel no questions tending to qualify him as an expert on the law of the State of New York. The counsel for each defendant cross-examined the plaintiff and in the course of his cross-examination by the counsel for the defendant Robinson, occurred the following questions and answers:

"Q. Well, now I want to ask you about those Heard Lumber Company notes. On the 29th day of July those notes became due didn't they? A. The Heard Lumber Company's notes? — Q. No, those notes which are before you, became due? [The notes in suit.] A. They became due on the 31st. — Q. Now pardon me, don't let's quibble about that. They became due four months from March 29th, that being Saturday they were presentable and payable on the 31st. A. Yes, sir."

The plaintiff rested. Thereupon the counsel for the defendants asked the judge to direct a verdict for the defendants on the ground, among others, that no notice to the indorsers had been proved, the notarial certificates making no recital in this respect. Thereupon the counsel for the plaintiff requested that they might reopen their case and the counsel for the defendants objected. The judge allowed the counsel for the plaintiff to reopen the case. The case being reopened the counsel for the plaintiff again called the plaintiff to testify on the questions of demand and notice as follows:

"Q. Did you receive, Mr. Demelman, notice of protest from New York, on those two notes? A. I did. — Q. And are these copies which you received from New York? A. Yes, I received about a dozen of them, I think. I don't know the exact amount: two for each indorser. — Q. And what did you do with them? A. I put them in the mail and sent them to each indorser, as — whatever the addresses were on the back of the notes. — Q. And when did you receive them? A. Mailed July 31, I received



them August first, the next morning. . . . I mailed them to the parties, indorsers on the notes. — Q. Whom did you mail them to: name them, please. A. Charles G. Brazier, George I. Robinson, Jr. and Edward L. Collins, and George N. Morton, at 8 o'clock. — Q. What date? A. August the first."

The plaintiff did not offer in evidence the laws and statutes of the State of New York.

The defendants called no witnesses. At the close of the plaintiff's testimony the defendants asked the judge to order a verdict for the defendants on the ground that no proper notice was sent. The judge ruled, as a matter of law, that the plaintiff was not entitled to recover, because no evidence had been introduced as to the law of the State of New York, and ordered the jury to return a verdict for the defendants Brazier and Robinson. The plaintiff alleged exceptions, which after the death of *Flaherty, J.* were allowed by *Gaskill, J.*

The case was submitted on briefs.

*H. C. Sawyer & E. M. Schwarzenberg*, for the plaintiff.

*F. N. Nay & R. E. Buffum*, for the defendant Brazier. The ruling ordering a verdict for the defendants was correct. The notes in question were dated March 29, 1905, payable in four months. The twenty-ninth day of July, 1905, was a Saturday. With the customary three days of grace allowed everywhere by common law, the notes became due on Tuesday, August 1, and any demand made before that date, or protest, or notice to indorsers, was of no effect. *Mechanics Bank v. Merchants Bank*, 6 Met. 13, 23, 24.

No evidence having been produced as to the law of New York State the presumption was that the common law prevailed there, and that August 1 was the date for presentment, demand and the sending of notices. And, this being so, the presentment and demand of July 31, which appeared in the evidence, was an idle ceremony and conferred no rights on the holder of the notes as against the indorsers. Nor was the matter altered for the better by the sending of notices, which were based on the presentment, demand and protest of July 31.

The plaintiff now contends that sufficient testimony as to the laws of the State of New York was introduced when he testified that the notes became due on July 31. No attempt was made

to qualify the plaintiff as an expert on New York law, he was not a resident of New York, nor was he a member of the bar. The answers relied on occurred on cross-examination, and it is submitted they fairly cannot be held to furnish competent and sufficient evidence as to the statutory law of another State. The usual practice is for the statutes themselves to be introduced in evidence by means of copies duly authenticated. R. L. c. 175, § 75.

It is quite apparent that neither the judge nor the parties at the time these questions were asked on the plaintiff's cross-examination supposed that evidence was being put in as to the statute law of New York State. To permit the casual answer of the plaintiff on cross-examination that the notes became due on July 31 to take the place of other proof is to say that the plaintiff's statements are sufficient to prove not only the terms of a written statute but also the construction of it. But the construction of a foreign statute is a matter of law. *Ufford v. Spaulding*, 156 Mass. 65, 66, and cases cited.

*C. F. Eldredge*, for the defendant Robinson. Under the common law presumed to exist throughout the United States, notes of this character were entitled to days of grace, and it is only by the statutes of our State that days of grace were abolished. St. 1896, c. 228. It also is only by a statute of our State that notes falling due on Saturday are payable and presentable on the Monday following. These are exceptions to the common law, and are made by express statutes of Massachusetts. If there is any such law in New York it must be by reason of a similar statute, and if the plaintiff wished to prove any such law, it was incumbent upon him to produce the statute. No proof of any statute having been offered by the plaintiff, the judge was right in ruling that the common law of New York is presumed to be the same as that of this Commonwealth. There is no presumption that the statute law of New York is the same as in this State. *Cherry v. Sprague*, 187 Mass. 113, 117.

By R. L. c. 175, §§ 75-77, the existence of all foreign laws must be proved as facts, and the court in its discretion in case of a statute may reject any evidence unless accompanied by a copy of the statutes. The judge, in this case, exercised his discre-

tion by not accepting anything but the statutes, which were not offered, and this is shown by his direction of the verdict for the defendants.

BRALEY, J. If the promissory notes held by the plaintiff were presented for payment before their maturity this action cannot be maintained against the indorsers, as the makers had not refused payment upon due presentment and demand. *Wood v. Corl*, 4 Met. 203, 205. By the law merchant which is part of our common law, each note was entitled to days of grace, and while grace has been abolished by the St. of 1896, c. 496, now R. L. c. 73, § 103, and negotiable paper is deemed to be payable at the time named therein, unless there is a stipulation for delay, and when falling due upon Saturday may be legally presented for payment on the following Monday, there is no presumption that the laws of New York, by which these contracts are governed, contain similar statutory provisions. *Lowell Trust Co. v. Pratt*, 183 Mass. 379. *Cribbs v. Adams*, 13 Gray, 597. *Murphy v. Collins*, 121 Mass. 6. *Kelley v. Kelley*, 161 Mass. 111. When evidence of a similar statute is not furnished the ordinary presumption that the common law of that jurisdiction remains unmodified and is similar to our own must prevail, and accordingly it would follow that the notarial protest and notice of dishonor sent to the defendants were premature. *Callender v. Flint*, 187 Mass. 104, 107. *Mechanics Bank v. Merchants Bank*, 6 Met. 13, 23, 24.

The only question remaining is to determine if there was any evidence that the notes were there payable according to their tenor, at the date of presentment. By R. L. c. 175, § 77, it is provided that the "existence, tenor or effect of all foreign laws may be proved as facts by parol evidence." When therefore upon cross-examination, and without objection, the plaintiff explicitly stated that the notes were presentable and payable on the day of their protest, then without further formal proof there was testimony the weight of which was for the consideration of the jury that the liability of the defendants, who as indorsers had been seasonably notified, became fixed on that date. *Lowell Trust Co. v. Pratt*, *ubi supra*.

*Exceptions sustained.*

## KELLY KOFFMAN vs. SOPHIE KOFFMAN.

Suffolk. December 18, 1906. — January 8, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, &amp; SHELDON, JJ.

*Marriage and Divorce. Legitimacy.*

At a hearing on the objections of a wife to making absolute a decree *nisi* for a divorce obtained against her for cruel and abusive treatment, if the libellee shows that a child was born to her after the decree *nisi* was granted and that the date of its birth is consistent with its having been begotten by an act of intercourse which the libellee set up before the decree *nisi* as condonation on the part of her husband, the entire proceedings can be reviewed for the purpose of determining what shall be the final disposition of the case.

If, at a hearing on the objections of a wife to making absolute a decree *nisi* for a divorce obtained against her for cruel and abusive treatment, the libellee shows that a child was born to her after the decree *nisi* was granted and that the date of its birth is consistent with its having been begotten by an act of intercourse which the libellee set up before the decree *nisi* as condonation on the part of her husband, and the judge finds on a review of the evidence, including the testimony of the husband, that there was no condonation because there was no act of intercourse between the husband and wife at the time alleged and testified to by the libellee, this finding, although it may imply adultery on the part of the libellee, does not affect the legitimacy of the child, as the evidence properly considered by the judge upon the issue of the condonation would not be competent to show that a child thus born in wedlock was illegitimate.

**LIBEL FOR DIVORCE** on the ground of cruel and abusive treatment. The libel was dated July 22, 1904, and an order of notice thereon was issued on August 19, 1904, personal service thereof being made on August 22, 1904.

In the Superior Court the case was heard by *Harris, J.* at the October divorce sitting in 1904, and after a partial hearing was continued to December, 1904, when the hearing was resumed and finished. The judge, upon the question of cruel and abusive treatment, found for the libellant. At the hearing in December, the libellee asserted, both by way of denial and as condonation, that there had been a single act of intercourse subsequent to the date of the libel, to wit, on August 20, 1904.

The libellant and libellee both testified that there was no cohabitation from June 18, 1904, until August 20, 1904. The libellee testified in December that there was a single act of in-

tercourse on Saturday, August 20, at a place and under circumstances described by her.

The libellant denied her story, and testified that on the day specified by the libellee, and for some days before and after, he was not in the Commonwealth, and produced other evidence on this point. On this question, upon the evidence presented, the judge found as a fact that the act of intercourse did not take place, and found that there had been no condonation by reason thereof. A decree *nisi* was entered.

On May 29, 1905, objections to the entry of a decree absolute were filed by the libellee, and a hearing thereon was had on June 30, 1905. At this hearing the libellee offered no new evidence as to the act of intercourse except the birth of a child on May 22, 1905, which date would have been entirely consistent with its having been begotten on August 20, 1904. The child was exhibited to the judge as evidence on the question of paternity, but the judge found no resemblance to the libellant and declared himself unassisted by the exhibit. The libellee repeated her story as to the occurrences of August 20, 1904, but testified that she then was unable to give the date. The evidence was offered by the libellee under her objections to making the decree absolute.

The libellee's contention was that intercourse after the date of the libel as matter of law would be a condonation. She also contended that the birth of the child at a time entirely consistent with her claim of condonation, and at a time which proved it to have been begotten at about the period that she testified it was begotten by her husband, was such a fact that, coupled with the presumption of legitimacy, an absolute decree of divorce would not be warranted excepting upon positive and overwhelming evidence sufficient to establish beyond all reasonable doubt that the husband could not have been the father of the child and that there was absolute non-access on the part of the husband at the time when the conception of the child might have taken place.

The judge found as a fact that the libellee had been guilty of cruel and abusive treatment of the libellant, as charged in the libel; and that there had been no condonation by reason of any intercourse on August 20, 1904.

He ruled that intercourse on August 20, 1904, or at any time after June 18, as a matter of law, would constitute condonation.

He also ruled that the libellee, having denied all intercourse except on one specific date at a place and under circumstances particularly described by her, and having failed to support her assertion as to that time, was not, as matter of law, entitled to the benefit of the general presumption, and that upon all the facts in the case he was not bound to find in her favor.

The objections were overruled and the libellee excepted to the rulings made and to the refusal to give the rulings requested.

At the close of the evidence the libellee requested the judge to rule and find in accordance with the libellee's requests for rulings and findings, which were sixteen in number and were made a part of the bill of exceptions.

The judge gave the rulings requested by the libellee from the first to the eleventh both inclusive, and refused to give the twelfth as unnecessary, refused to give the thirteenth and fourteenth as covered by other rulings and by the findings of fact, refused to make the finding and ruling contained in the fifteenth and sixteenth requests and ruled that the sixteenth request was not a request for a ruling of law but was a request merely for a finding of fact.

The rulings which the judge refused to give as stated above were as follows:

12. If a decree of divorce absolute were to be entered it would practically mean the illegitimatizing of the child born subsequent to the decree *nisi*, and a decree absolute of divorce would not be warranted under such circumstances excepting upon evidence sufficient in weight and in kind to justify the entering of a decree of illegitimacy in a case directly involving that question.

13. The situation of the parties to this libel and of their family is materially changed since the date of the granting of the decree *nisi*, and especially so by the birth of this second child as aforesaid, and in view of all the facts and circumstances it would be contrary to law and justice and contrary to the practice of the courts in like cases to grant to a husband a decree of divorce under the existing state of facts.

14. The libellee having introduced no new evidence at the hearing on objections to the decree absolute as to the several allegations contained in paragraphs 2 and 8 therein, the court does

not now pass upon the matters contained in said paragraphs 2 and 3.

15. Upon all the evidence the court finds for the libellee and orders that the decree *nisi* heretofore entered be vacated and that the libel be dismissed.

16. The whole of the evidence in this case is not sufficient to support the libel.

The judge overruled the objections to an absolute decree. To this order and to the several rulings and refusals to rule as stated above the libellee alleged exceptions.

*H. S. Dewey*, for the libellee.

*W. Charak*, for the libellant.

BEALEY, J. At the trial of the libel the defence of condonation by a single act of intercourse was not sustained upon the evidence, and a decree *nisi* was entered. Before the time was ripe for making this decree absolute a daughter was born to the libellee, and it was within the scope of her objections not only to introduce this fact, but in connection therewith to review the former evidence upon this issue for, until final decree, the divorce was not absolute, nor the marriage contract dissolved, and as the parties legally remained husband and wife the entire proceedings could be reviewed for the purpose of determining what should be the final disposition of the case. *Pratt v. Pratt*, 157 Mass. 503, 505. *Moors v. Moors*, 121 Mass. 232, 233. *Cook v. Cook*, 144 Mass. 163. *Chase v. Webster*, 168 Mass. 228. The only additional evidence seems to have been the birth of the child, and upon further consideration of this event with the former evidence, the judge declined to reverse his finding, although correctly ruling as requested that if condonation were found the libel would have to be dismissed. But this finding does not as contended by the libellee tend to bastardize the child as it is well settled that the declarations of either parent are inadmissible to show that children born after marriage are illegitimate. The issues were distinct, and if in the attempt to show condonation the evidence tended to prove adultery on the part of the libellee, although the daughter was born within the natural period from the time of the alleged act of intercourse, this would not be competent evidence to prove her illegitimate. *Canton v. Bentley*, 11 Mass. 441, 443. *Hemmenway v. Towner*,

1 Allen, 209. *Phillips v. Allen*, 2 Allen, 453. *Sullivan v. Kelly*, 3 Allen, 148, 150. *Haddock v. Boston & Maine Railroad*, 3 Allen, 298, 300. *Abington v. Duxbury*, 105 Mass. 287, 290. *Chamberlain v. People*, 23 N. Y. 85, 88. *Tioga County v. South Creek Township*, 75 Penn. St. 433, 437. *Egbert v. Greenwalt*, 44 Mich. 245, 248. *Mink v. State*, 60 Wis. 588, 584. *Parker v. Way*, 15 N. H. 45. *Bowles v. Bingham*, 2 Munford, 442. *Goodright v. Moss*, Cowp. 591. *Murray v. Milner*, 12 Ch. D. 845. *Dysart Peerage case*, 6 App. Cas. 489. The twelfth request therefore was refused rightly, nor could the remaining requests properly be given. Upon evidence not reported the allegations of the libel had been proved to the satisfaction of the judge, and the marital offence not having been forgiven by the libellant, he was entitled to a final decree. *Whiting v. Whiting*, 114 Mass. 494.  
*Exceptions overruled.*

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METCALF ADAMS vs. INHABITANTS OF STONEHAM.

Middlesex. December 13, 1906. — January 3, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

*Way, Defect in highway. Evidence.*

In an action under R. L. c. 51, § 18, against a town for personal injuries caused by an alleged defect in a highway consisting of the presence in the road of a large number of loose stones of different sizes over which the plaintiff's horse stumbled, evidence offered by the defendant, to prove that it had made an appropriation for the repair of streets in the year of the accident sufficient to provide for an expenditure of a certain sum of money per mile for all its streets, properly may be excluded as irrelevant to the question whether it had used reasonable care and diligence to keep the street where the alleged defect existed in good repair.

The presence in a street of a town of a large number of loose stones of different sizes over which the horse of a traveller stumbles may be found to be a defect in the highway within the meaning of R. L. c. 51, § 18.

TORT under R. L. c. 51, § 18, for personal injuries received by reason of an alleged defect in Green Street, a highway of the defendant, consisting of loose stones on which the plaintiff's horse stepped and stumbled while the plaintiff was driving in a wagon on June 5, 1901. Writ dated July 8, 1901.



In the Superior Court the case was tried before *Mason*, C. J. Against the defendant's objection and exception he excluded the evidence which is described in the opinion. The character of the alleged defect and the evidence in regard to it also are described in the opinion. At the close of the evidence the defendant asked the Chief Justice to instruct the jury as follows :

1. Upon all the evidence the plaintiff cannot recover.
2. Upon all the evidence there is no defect proven in the case for which the defendant would be liable.

The Chief Justice refused to give either of these instructions, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$500 ; and the defendant alleged exceptions, which after the death of *Mason*, C. J. were allowed by *Fessenden*, J.

The case was submitted on briefs.

*H. F. Hurlburt & C. M. Davenport*, for the defendant.

*S. L. Whipple, W. R. Sears & H. W. Ogden*, for the plaintiff.

SHELDON, J. The first question raised by these exceptions is whether the court erred in excluding evidence offered by the defendant to show how much money was appropriated by the defendant town for the repair of streets in the year of the accident, for the purpose of showing how much per mile of streets was appropriated that year for that purpose. There was testimony of the total amount raised by taxation that year, that there were fifty-eight miles of streets in the town at that time, and that the neighborhood of this street was not thickly settled, but nothing further was shown or offered to be shown upon this point.

Since the passage of St. 1877, c. 234, § 2, now incorporated into R. L. c. 51, § 18, a town is not liable for injury or damage caused by a defect in its ways unless it has failed to exercise reasonable care and diligence in the premises ; *Post v. Boston*, 141 Mass. 189, 193 ; and inasmuch as towns are not required to incur disproportionate and unreasonable expenses in keeping their streets reasonably safe for travel, it is competent for a town, when sued under this statute, to show among other things what it was reasonable and practicable to do with reference to existing conditions, the cost of what was done and of what would have needed to be done to remedy the defect in question,

and the amount of money available for that purpose. The whole matter of the alleged negligence of the town is for the jury, and these considerations have a legitimate bearing upon that question. *Rooney v. Randolph*, 128 Mass. 580. *Hayes v. Cambridge*, 136 Mass. 402. *Sanders v. Palmer*, 154 Mass. 475. *Weeks v. Needham*, 156 Mass. 289. *O'Brien v. Woburn*, 184 Mass. 598, 599. But mere evidence of the total amount raised by taxation, of the amount appropriated by the town for repairs of streets, of the total length of streets to be cared for, and of the amount of appropriation per mile of street, never has been held to be competent by itself; and it seems to us to fall far short of furnishing any proper guide for a jury in passing upon the question of whether any particular defect could have been remedied by the exercise of reasonable care and diligence. As pointed out in the plaintiff's argument, the fact that the town was willing to spend money which would average up to a certain amount per street mile is entirely irrelevant to the question whether it had used reasonable care and diligence to keep this particular street in good repair. There was no offer to show how much had been actually spent either upon this street or any other street in the town. *Rooney v. Randolph*, 128 Mass. 580, and *Hayes v. Cambridge*, 136 Mass. 402, so far as we have discovered, are the only cases in which the exclusion of evidence of this character was held to be erroneous. In the latter of these cases, the offer was to show that the defendant had done all that it was practically possible to do towards clearing its streets of a general accumulation of snow and ice; in the former, it practically was to show that the cost of wholly clearing away the drift in question would have been disproportionate and excessive. In the case at bar, the defendant's offer fell far below this. In *Sanders v. Palmer*, 154 Mass. 475, which comes nearest to supporting the defendant's position, some additional facts were shown to those included here in the evidence and the offer; the case turned at least in part (see the opinion, p. 477) on the meagreness of the plaintiff's bill of exceptions; and it was said by Knowlton, J., in giving the opinion of the court, that "the length of the roads which it [the town] is obliged to maintain, the ease or difficulty of maintaining them, the amount of travel over them, and the amount of assessable

property in the town, are all elements to be considered in determining how high a degree of excellence can reasonably be required of a town in the construction and repair of any particular piece of road." In our opinion, the exclusion of the testimony offered by the defendant cannot be said to have been erroneous.

The alleged defect in the street was the presence of a large number of loose stones of sizes varying from large to small, upon the surface of the roadbed, upon which the plaintiff's horse stumbled. Without going over the evidence as to this question, we think that it was properly for the jury, and that they might find that the street was defective for this reason. *Savory v. Haverhill*, 182 Mass. 824. *Lamb v. Worcester*, 177 Mass. 82. Doubtless there was also much evidence that this was an ordinary country road, of a gravelly character, with only an occasional small stone; and there is room for argument, which doubtless was pressed upon the jury, that upon the weight of the evidence there was here nothing in the nature of a real defect. But we cannot revise the conclusion of the jury. The second instruction asked for was rightly refused.

It has not been argued that there was not evidence for the jury on all the other questions involved in the case, and accordingly the first instruction requested could not have been given.

*Exceptions overruled.*



HOLMAN K. WHEELER & another vs. WILLIAM J. ANGLIM.

Essex. January 3, 1907. — January 3, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

*Evidence, Opinion: experts, Materiality. Architect. Practice, Civil, Exceptions.*

In an action on a *quantum meruit* by an architect for compensation for professional services in making preliminary plans for a building, the plaintiff, being an expert, may testify as to the value of his services and as to a universal usage among architects and builders to charge for preliminary plans one per cent of the estimated cost of the building.

In an action on a *quantum meruit* by an architect for compensation for professional services in making preliminary plans for a building, where the defence is that the plans were furnished by the plaintiff in a competition with the understand-

ing that the plaintiff should receive no compensation unless his plans were accepted, evidence offered by the defendant to show that other architects submitted preliminary plans for the building in competition and the correspondence of the defendant with such other alleged competing architects should be excluded as immaterial, unless it is shown that these matters were made known to the plaintiff.

No exception lies to the exclusion of testimony which later in the trial is given by the same witness.

CONTRACT on a *quantum meruit* by the members of a firm of architects for \$800 as compensation for professional services in making preliminary plans for a business building of the defendant in Brockton of the estimated cost of \$80,000. Writ dated August 18, 1905.

In the Superior Court the case was tried before Fox, J.

The testimony introduced by the plaintiffs tended to show that the defendant employed the plaintiffs, a firm of architects having their principal office in Lynn, to prepare sketches and plans for a business block, the building of which in Brockton was being contemplated by the defendant. The plaintiffs introduced no evidence of any written or oral agreement as to compensation.

The defendant contended and testified that the plaintiffs were permitted to submit sketches and plans in competition with other architects; that the plaintiffs and several other architects did in fact submit competitive sketches and plans; that it was understood and agreed between himself and the plaintiffs that they should be entitled to and receive no compensation unless their sketches and plans were chosen by him in the competition, and that sketches and plans other than those of the plaintiffs were so chosen. The plaintiffs denied that they had any knowledge of any competition or that they should receive no compensation unless their plans were chosen.

Charles L. Betton, one of the plaintiffs, testifying in their behalf, having stated that he told the defendant that an eight story building would cost about \$10,000 a story, making a total of about \$80,000 for the building, on direct examination was asked "What was a fair price for doing this work for Mr. Anglim?" and replied "Eight hundred dollars"; to the admission of which question and answer the defendant objected and excepted.

Holman K. Wheeler, the other plaintiff, testifying in behalf of the plaintiffs, on direct examination was asked "Whether or not there is a uniform usage among architects and builders, a universal usage that has continued ever since you have been in business, whereby they charge their customers a certain per cent upon the estimated cost of the building for their services?" and replied "Yes, there is"; and then was asked "What is that price that architects charge for preliminary plans?" and replied, "One per cent of the estimated cost of the building," and then was asked, "What was the value of this work that you did for Mr. Anglim?" and replied, "Eight hundred dollars"; to the admission of all of which questions and answers the defendant objected and excepted. The last question was objected to on the ground that the witness was not competent to pass on the value.

The defendant, having testified concerning interviews with the plaintiffs regarding competition, in the course of his direct testimony was asked, "to show the status of the witness's mind in what he was doing," "At the time that they (the plaintiffs) were working upon and submitting to you the sketches for your examination, had you then been in conference with architects in relation to the same job?" On the objection of the plaintiffs the question was excluded, and the defendant excepted.

The defendant having testified that the plans of one J. William Beal, a Boston architect, had been accepted for the building, and that he had been in consultation with Beal at the time he was consulting and conferring with the plaintiffs, on direct examination was asked, "And did Mr. Beal submit preliminary sketches upon competition in the same way?" On the objection of the plaintiffs the question was excluded, and the defendant excepted.

The defendant on re-direct examination was asked "Did you have correspondence with these other competing architects during the time that you were corresponding as has appeared here with Wheeler and Betton?" and replied "I did"; and then was asked "And was that correspondence concerning plans which they were making in competition for this lot?" To the exclusion of which questions and answer on the plaintiffs' objection the defendant excepted.

The defendant sought to introduce correspondence from the other alleged competing architects, but such correspondence on the objection of the plaintiffs was excluded ; to which ruling the defendant excepted.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiffs were not entitled to recover. The judge refused so to rule, and found for the plaintiffs for the full amount named in their declaration with interest. The defendant alleged exceptions.

The defendant submitted no brief or argument.

*J. C. Batchelder*, for the plaintiffs, submitted a brief.

BY THE COURT. The exceptions in this case relate to the admission and exclusion of evidence. The opinions of the plaintiffs as to the value of their services were competent. They were experts. The relations of the defendant to other architects, not made known to the plaintiffs, were immaterial. Other testimony, to the exclusion of which exception was taken, was given by the same witness in another part of the case, and the defendant was not injured by its exclusion. The defendant has not pointed out any error in the rulings, and we do not discover any.

*Exceptions overruled with double costs.*



## SUPPLEMENT.

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### OPINION OF THE JUSTICES TO THE SENATE.

A statute restricting the rights of contract of the owners of letters patent from the United States as distinguished from the owners of other property would not be constitutional.

The enactment of a statute of general application, including persons entitled to rights under letters patent from the United States with the rest of the community, which has the effect of preventing the holder of a monopoly derived from letters patent from imposing conditions on the sale or lease of the patented article which create other monopolies not granted to him by federal authority, is within the police power of the Legislature. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices.

It is within the constitutional power of the Legislature to enact a law of general application producing the result that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, shall not lease and license the use of machines embodying the patented invention, upon conditions which are, when agreed to by the lessee and licensee, in effect, a prohibition upon the lessee and licensee from obtaining of any person other than the lessor and licensor machines for performing the same operation as that performed by the leased and licensed machine, during the term of such lease and license. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices.

It is within the constitutional power of the Legislature to enact a law of general application producing the result that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, where he has certain patented machines designed to perform two certain successive steps in making an article or product, shall not lease and license the use of one of the machines, which is designed to perform one of the steps, upon conditions which are, when agreed to by the lessee and licensee, in effect a prohibition upon the lessee and licensee from using, in the manufacture of such article or product, the leased and licensed machine, if a machine not obtained from the lessor and licensor is or is to be used to perform the other of the steps, during the term of the lease and license. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices.

It is within the constitutional power of the Legislature to enact a law of general application producing the result that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, shall not lease and license the use of a machine embodying the patented invention, upon the conditions, when agreed to by the lessee and licensee, that the latter, as



rental for the machine and as royalty for the use of the patented invention, shall purchase from the lessor exclusively material or merchandise to be used in the machine, during the term of such lease and license. KNOWLTON, C. J. & MORRIS, J., differing in opinion from the other justices.

ON April 12 and 15, 1907, the following orders were passed by the Senate, and on April 17 were transmitted to the Justices of the Supreme Judicial Court. On April 30, 1907, the Justices returned the answers which are subjoined :

Senate, April 12, 1907.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions of law :

First. Is it within the constitutional power of the Legislature to enact a law that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, shall not lease and license the use of machines embodying the patented invention, upon conditions which are, when agreed to by the lessee and licensee, in effect, a prohibition upon the lessee and licensee from obtaining of any other person than the lessor and licensor machines for performing the same operation as that performed by the leased and licensed machine, during the term of such lease and license ?

Second. Is it within the constitutional power of the Legislature to enact a law that the owner of or licensee under letters patent of the United States, doing business in this Commonwealth, where he has certain patented machines designed to perform two certain successive steps in making an article or product, shall not lease and license the use of one of said machines, which is designed to perform one of said steps, upon conditions which are, when agreed to by the lessee and licensee, in effect a prohibition upon the lessee and licensee from using, in the manufacture of said article or product, the leased and licensed machine, if a machine not obtained from the lessor and licensor is or is to be used to perform the other of said steps, during the term of said lease and license ?

Third. Is it within the constitutional power of the Legislature to enact a law that the owner of or a licensee under letters

patent of the United States, doing business in this Commonwealth, shall not lease and license the use of a machine embodying the patented invention, upon the conditions, when agreed to by the lessee and licensee, that the latter, as rental for the machine and as royalty for the use of the patented invention, shall purchase from the lessor exclusively material or merchandise to be used in the machine during the term of such lease and license?

These questions are propounded with a view to legislation, which is the subject matter of a pending bill, Senate Bill, No. 275, to regulate the lease and sale of machinery, tools, implements and appliances which embody one or more inventions patented pursuant to the Constitution of the United States and the laws enacted by Congress in respect to letters patent for inventions, in view of the fact that, for many years, contracts have been made by owners of patented machines, doing business in this Commonwealth, in which the lessee and licensee has agreed to do all the work which he has to do upon the leased and licensed machine; and, in case he has too much work for that machine, to take from the lessor under that lease, or a similar lease, sufficient additional machines to do his work; to pay the lessor, as rent or royalty for the use of the machine, certain sums in cash, or to purchase exclusively of the lessor material or merchandise for use in the machine, such as fastenings for use in a button fastening machine, eyelets or hooks in an eyelet or hook setting machine, tacks in a tack driving machine, or records in a phonograph or talking-machine; and, in some cases, where the lessor has other machines designed to perform successive steps in making an article or product, the lessee and licensee has agreed to use the leased and licensed machine only on an article or product in making which one or more of the lessor's other patented machines are used.

A copy of the Senate Bill, No. 275, now pending before the Senate, is hereby ordered to be transmitted herewith to the Justices of the Supreme Judicial Court, together with briefs and opinions of counsel which were filed with the Joint Committee on the Judiciary at the hearing on the petitions on which the said bill is based.

## SENATE BILL NO. 275.

## AN ACT

To regulate the Lease and Sale of Machinery, Tools, Implements and Appliances.

*Be it enacted, etc.*

SECTION 1. No person, firm, corporation or association shall insert in or make it a condition or provision of any sale or lease of any tool, implement, appliance or machinery that the purchaser or lessee thereof shall not buy, lease or use machinery, tools, implements or appliances or material or merchandise of any person, firm, corporation or association other than such vendor or lessor, but this provision shall not impair the right, if any, of the vendor or lessor of any tool, implement, appliance or machine protected by a lawful patent right vested in such vendor or lessor to require by virtue of such patent right, the vendee or lessee, to purchase or lease from such vendor or lessor such component and constituent parts of said tool, implement, appliance or machine, as the vendee or lessee may thereafter require during the continuance of such patent right: *provided*, that nothing in this act shall be construed to prohibit the appointment of agents or sole agents to sell or lease machinery, tools, implements or appliances.

SECTION 2. Any person, firm, corporation or association, or the agent of any such person, firm, corporation or association, violating the provision of this act, shall be punished for each offence by a fine not exceeding five thousand dollars.

All leases, sales or agreements therefor hereafter made in violation of any of the provisions of this act shall be void as to any and all of the terms or conditions thereof so in violation of said provisions of this act.

Senate, April 15, 1907.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important question of law:

Is it a constitutional exercise of the legislative power of the General Court to enact a statute in the following form, viz. :

[Here was inserted a copy of Senate Bill No. 275, printed above.]

ORDERED, That copies of the briefs submitted to the Joint Committee on the Judiciary by counsel for the petitioners for such legislation, and of counsel for the remonstrants thereto, be transmitted herewith to the Justices of the Supreme Judicial Court.

To the Honorable the Senate of the Commonwealth of Massachusetts :

We, the undersigned Justices of the Supreme Judicial Court, are of opinion that if we take the three questions stated in your order of April 12, 1907, to refer to a law which in terms should relate to an owner of or a licensee under letters patent of the United States as distinguished from owners of other property and accordingly would not be of general application, then the questions must be answered in the negative. If, however, they are to be taken to refer to general legislation which should simply include persons entitled to rights under such letters patent with the rest of the community, we are of opinion that they should be answered in the affirmative. We are also of opinion that a statute in the form annexed to your order of April 15, 1907, would be constitutional, and that the question contained in that order must be answered in the affirmative.

It seems to us to be important to remember that the right secured by letters patent of the United States is the right of a monopoly of the invention described therein. With this right a State has no power to interfere by its legislation ; nor has it the power to interfere with the exercise of any right which is necessarily incident to the exercise of that principal right. But we think that it is equally clear, as was stated by Mr. Justice Harlan in *Patterson v. Kentucky*, 97 U. S. 501, "that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to

afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." We think also that it is manifest that not every right which in the absence of legislative prohibition can be by contract annexed to the assignment of a patent right, or to a license given thereunder, or to the sale or lease of a patented machine, is therefore to be said to be necessarily incident to the full exercise of the right secured by the patent. We regard it as now settled by the decision of this court in *Commonwealth v. Strauss*, 191 Mass. 545, that the power of the Legislature to decide what monopolies in trade should be forbidden as injurious to the general welfare rests upon the same foundation, and (unless limited by some provision in the national Constitution) may be exercised as fully and freely, as its power to legislate for the protection of the public health or the public morals. Unless and until that decision shall be overruled by the Supreme Court of the United States, we are satisfied to follow it.

It is true of course, as has been already said, that the State has no power to interfere with the monopoly given by letters patent of the United States to the holder thereof. As pointed out by Mr. Justice Harlan in *Patterson v. Kentucky*, *ubi supra*, adopting the language of the Supreme Court of Ohio in *Jordan v. Dayton*, 4 Ohio, 294, that monopoly is simply the right to prevent others from using the products of his labors except with his consent. His own right of using is not enlarged or affected. In other words, the patentee's right is a monopoly in the invention; but it does not protect from State legislation any monopoly in other commercial ventures which the owner of the patent may attempt to establish or maintain. But such legislation as that of which we are speaking could have no further operation than to prevent the holder of such a monopoly (which is beyond the control of the Legislature) from extending his power to the creation of other and further monopolies which have not been granted to him by any federal authority, and which we think that the Legislature under its general authority has the power to

prohibit. The federal government cannot exercise the police power for the protection of the inhabitants of a State. *United States v. Dewitt*, 9 Wall. 41. If the holders of patent rights are not subject to statutes passed for the protection of the public health or morals, or for the prevention of other monopolies than those which are secured by patents, then they are beyond the reach of any police regulation. But such a contention cannot be sustained. *Patterson v. Kentucky*, 97 U. S. 501. *Webber v. Virginia*, 103 U. S. 344, 348. *Allen v. Riley*, 203 U. S. 347.

We find nothing in *Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co.* 77 Fed. Rep. 288, which seems to us to be at variance with our opinion. That case simply decides that a stipulation like those here considered may by contract be made incident to a sale of the patented machine. In the absence of prohibiting legislation we do not doubt this. What the effect of such a statute would be was not considered in that case. Nor was that case decided upon any distinction between a patented and an unpatented article. The discussion rested upon the general right of the owner of any property to dispose of it as he sees fit. The decision would have been the same if the article had not been patented. The same may be said of *Bement v. National Harrow Co.* 186 U. S. 70.

Our answer is upon the understanding that the proposed legislation is to be applicable to contracts to be made in the future, and is not to affect the obligation of contracts already made. Nor have we considered the question whether the owner of a patent could be prevented from imposing a condition in giving a license to use his patent that the licensee should not use any infringing contrivance.

While our opinion is that which we have stated, it is of course true that these questions are of federal cognizance, and can be finally determined only by the Supreme Court of the United States.

JOHN W. HAMMOND.

WILLIAM CALEB LORING.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

April 30, 1907.

To the Honorable the Senate of the Commonwealth of Massachusetts:

We, the Chief Justice and one of the associate justices of the Supreme Judicial Court, have received the questions proposed by the orders of the Honorable Senate, bearing date April 12, 1907, and April 15, 1907, respectively, and we answer them as follows:

These questions arise under the Constitution of the United States, and the only tribunal that can give answers of final authority is the Supreme Court of the United States. They introduce us to a field in which we often find a nice, and sometimes difficult, balancing of considerations, to determine the line of demarcation between the rights of the people, under the Constitution, to make contracts and transact business as they choose, and the right of the State, in the exercise of the police power, to regulate and limit such action for the common good. The general subject was considered in *Commonwealth v. Strauss*, 191 Mass. 545, which case is now pending upon a writ of error before the Supreme Court of the United States. The questions before us relate to a subject which is not embraced in the statute then before the court, and which was not referred to by counsel or the justices at any stage of the proceedings in that case. They relate partly to the rights of a patentee to lease or license the use of machines embodying his patented invention.

The patent laws of the United States had their origin in an intention of the framers of the federal Constitution, expressed in § 8 of art. 1 of that instrument, to encourage inventors by giving to a patentee, for a term of years, a monopoly of the use of his invention, with the right to control it absolutely in such a way as he deems best. The right to create a monopoly in the business to which the invention relates, so far as this business can be affected by the use and control of the patent, is thus taken out of the rule of public policy which discourages the creation of monopolies. There has been doubt as to the extent of the right of the State, in the exercise of the police power, to interfere with the use of a patented invention by its owner. We think the true rule is that the issuing of a patent does not authorize its owner to use it in violation of laws enacted in the exercise of the police power for the protection of the public

health, the public safety, or the public morals on subjects other than those relating to the prevention of monopolies and the restraint of trade. For illustration, the State can prohibit a patentee from making it a condition of a sale of a patented invention that the vendee shall use it for an immoral purpose. *Vannini v. Paine*, 1 Har. (Del.) 65. It can prohibit a patentee of a dangerous invention, such as dynamite, from manufacturing it on premises adjoining a public school house. It can prohibit a patentee of a dangerous illuminating oil from selling it to the public. *Patterson v. Kentucky*, 97 U. S. 501. It can require a person engaged in selling machines to take out a license therefor, by a statute which would include, within the requirement, patented machines. *Webber v. Virginia*, 103 U. S. 344, 348. It can require a person engaged in selling patent rights to file in a public office an authenticated copy of the letters patent. *Allen v. Riley*, 203 U. S. 347. *Woods v. Curl*, 203 U. S. 358. Such provisions relate to the public morals, the prevention of frauds or the public safety. The rights of a patentee are subject to legislation for the protection of these public interests. See also *People v. Russell*, 49 Mich. 617, 619; *Palmer v. State*, 39 Ohio St. 236, 239; *State v. Delaware & A. Tel. & Tel. Co.* 47 Fed. Rep. 633; *Arbuckle v. Blackburn*, 113 Fed. Rep. 616, 627. A State cannot, for the promotion of the general welfare, cut down the patentee's right to the exclusive enjoyment of his invention from seventeen years to ten years, nor limit or affect his right to have a monopoly of the business to which the patent relates, so far as the use and control of his patent enables him to create and maintain a monopoly. The right of the State to limit or prevent monopolies that are seriously detrimental to the general welfare is taken away by the Constitution of the United States in favor of inventors in the use of their patents. *Bement v. National Harrow Co.* 186 U. S. 70. *Columbia Wire Co. v. Freeman Wire Co.* 71 Fed. Rep. 302. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 77 Fed. Rep. 288. *United States Consolidated Seeded Raisin Co. v. Griffin*, 126 Fed. Rep. 364, 370. *Victor Talking Machine Co. v. The Fair*, 123 Fed. Rep. 424.

In the application of these principles to the matter before us, we have no hesitation in answering the first and second questions in the negative. The conditions referred to in them are imposed



for the purpose of maintaining and strengthening the monopoly created by the patent. They are conditions which the patentee has a right to impose, and the lessee or licensee has a right to accept. The effect of the prohibition referred to in the first question is to increase the use of the patented machine, and the prohibition mentioned in the second question has the same effect upon the use of the first patented machine, and a similar effect upon the use of the second patented machine belonging to the same owner. The effect in each case is legitimate, and there is nothing objectionable in the agreement.

The third question introduces another element, namely, an agreement for the exclusive use, in the machine, of material or merchandise purchased of the lessor. Such material presumably is not patented, and it may be of such a kind that this agreement, in connection with the general use of the patented machine under leases from the patentee, will tend to create in him a monopoly of the sale of it. The question whether such an agreement is objectionable in law was considered at length by the United States Circuit Court of Appeals for the Sixth Circuit, in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 77 Fed. Rep. 288, and was answered unanimously in the negative. The patent in that case was upon a machine for fastening buttons upon shoes, and the owner of the patent sold machines, under contracts that they should be used only with metallic fasteners manufactured by the seller. These fasteners were not patented, and the result of the contract was to give the owner of the patent a monopoly of the manufacture and sale of the fasteners. After elaborate reasoning and illustration, the court said: "The monopoly in the unpatented staple results as an incident from the monopoly in the use of [the] complainant's invention, and is therefore a legitimate result of the patentee's control over the use of his invention by others. Depending, as such a monopoly would, upon the merits of the invention to which it is a mere incident, it is neither obnoxious to public policy, nor an illegal restraint of trade."

It is plain that such an agreement, as between the owner and the purchaser of the patented machine, without reference to its effect upon others, would be entirely unobjectionable. The owner might stipulate for a price or royalty to be received

entirely in a stated sum of money, or in part in the profits that he would make in furnishing fasteners at an agreed price for use in the machine. The purchaser, who could not obtain the machine at all except upon such terms as the owner should choose to impose, might as well agree to pay for it in that way as in any other.

The only doubtful question is whether the creation of a monopoly in the manufacture and sale of these fasteners, in its effect upon other manufacturers or upon the general public, is against public policy, as a result not legitimately incidental to the use of the monopoly created by the patent. It is to be noticed at the outset that a monopoly in the manufacture and sale of the fasteners cannot be created unless the patent is of such utility as to compete successfully with other modes of manufacture, and thus to control the business. This is equivalent to saying that it will lower prices, and confer a benefit upon the public through the authorized monopoly involved in the use of it. If a monopoly is created in an article used in the machine, it necessarily depends for its existence, not upon the contract as a contract, but upon the patent behind the contract, which alone makes the demand for it. If the price of the fasteners is kept higher than it would be without the agreement, other manufacturers of them are deprived of profits that they might obtain were it not for the agreement, and the general public, in buying shoes, are obliged to include a price for fasteners furnished by the owner of the patent at a large profit. But this would be only a part of the price put upon the public by the owner of the patent for the benefits conferred by the invention. In its essence it would not differ from the royalty paid for the use of a machine, which is ultimately a charge upon the general public that buys the manufactured product. For these reasons, and for others stated in the opinion in the case just cited, we think the monopoly created in the unpatented material used in the machine is a mere incident to the exercise of his legal rights by the patentee, and is authorized by the patent.

If such a monopoly, created under authority of the Constitution of the United States, is neither "obnoxious to public policy, nor an illegal restraint of trade," there is no foundation for an

exercise of the police power by a State through the enactment of a law to prevent the monopoly.

The doctrine of this decision has been applied by the United States Circuit Court of Appeals in the Second Circuit, in the decision of *Cortelyou v. Lowe*, 111 Fed. Rep. 1005. The Supreme Court of the United States, in *Bement v. National Harrow Co.* 186 U. S. 70, has also quoted from the opinion with approval. It seems to us that the decision rests upon sound principles, and that it fully covers the third of the questions submitted to us. This question must be answered in the negative.

It remains to consider the act referred to in the second order. We understand the words, "shall not buy, lease or use machinery, tools, implements or appliances, or material, or merchandise," to include any kind of machinery, tools, implements or appliances, or material or merchandise that the parties agree upon and specify, as well as such articles generally, without mention of particulars, so that there would be a violation of the statute, if, in the sale of a patented button fastening machine, there should be a provision that the purchaser should buy of the seller, at a stated price, all the metallic fasteners used in the machine. We interpret the statute in this way because of the common meaning of its words, and because of the statements contained in the first order transmitted to us by the Honorable Senate. Giving the statute this meaning, the answer given to the third question in the first order is applicable to the question in the second order. A statute depriving an owner of a patented machine of his right to provide for a purchase from himself of an unpatented article, to be used in the machine by one to whom he sells the machine, as a condition of his giving a right to use the patent, would be unconstitutional for the reasons already stated.

The decision in *Commonwealth v. Strauss*, 191 Mass. 545, is not at variance with this conclusion. The statute under consideration in that case relates to sales of "goods, wares and merchandise." There is nothing in its language to indicate that it was intended to include sales or leases of rights under patents. The sales referred to in it are sales of goods as goods, and of merchandise as merchandise, as distinguished from sales of patented inven-

tions, which include a right 'to create a monopoly. If it included sales of patents the statute would be unconstitutional, and this fact is important in determining its meaning. The Legislature is presumed to have intended to keep within its constitutional rights, and not to include in its legislation a subject that is outside of its constitutional authority. When the meaning of a statute would otherwise be doubtful this consideration is often decisive. The statute will be construed, if possible, in such a way as to make it constitutional. This principle has been applied repeatedly to questions like that under consideration. In *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239, 241, we find the following statement, with a citation of the authorities: "It is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the Legislature." This statute includes sales of ordinary goods, wares and merchandise as such, and sales of rights under patents are not within its provisions.

The act quoted in the order includes sales and leases of patented machinery. This appears by the statements in the first order, and also by the language of the act itself, which includes leases as well as sales, and is applied to articles that are often patented, namely, tools, implements, appliances and machinery, as distinguished from ordinary goods, wares and merchandise. It also deals with patented machines by expressly excepting the right of a vendor of such a machine to provide for the purchase from himself of constituent parts of the machine that may afterwards be required. We answer all the questions in the negative.

MARCUS P. KNOWLTON.  
JAMES M. MORTON.

April 30, 1907.



# INDEX.

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## ABORTION.

Sufficiency of indictment for advertising procuring of abortion, and correctness of rulings as to evidence of admissions by conduct and of intent, procured by police officer in disguise by lying and deceit, see **PLEADING, CRIMINAL**; **EVIDENCE, 35.**

## ACUSHNET RIVER BRIDGE.

1. The provision of St. 1900, c. 439, § 6, apportioning thirty-three per cent of the excess over \$220,000 of the cost of the completion of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, which carried it over the railroad of the Old Colony Railroad Company instead of crossing it at grade, upon that company to an amount not exceeding \$90,000, is constitutional and valid. *County Commissioners, petitioners, 257.*
2. By § 6 of St. 1900, c. 439, relating to the relocation and completion of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, providing that the \$220,000 of the cost of the completion of the bridge under that statute apportioned upon the county of Bristol should be apportioned by the commissioners appointed under St. 1893, c. 368, § 6, "between the cities and towns in the county of Bristol; as provided in said section six," the apportionment is directed to be made among the cities and towns in that county "which are or will be specially benefited" without apportioning any part of the cost to the county of Bristol itself. *Ibid.*
3. St. 1906, c. 238, authorized the commissioners, appointed under a previous statute to apportion the cost of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, to report their apportionment to the Superior Court so far as such cost had been determined and paid, although certain items of cost remained unascertained and unpaid, and to provide for the apportionment of such part of the cost as had not been ascertained or paid at the date of the report by declaring in what percentages such cost should thereafter be apportioned when it should have been ascertained and paid. *Held, that, the statute being silent in regard to the manner in which this future apportion-*

*Acushnet River Bridge (continued).*

ment should be made, the proper construction was that it should be made as it would have been if the cost already had been determined and paid at the date of the commissioner's report, that is, under the provisions of St. 1900, c. 439, § 6, the only purpose of the Legislature being to permit the direction of the apportionment before the ascertainment of the amount. *County Commissioners, petitioners*, 257.

4. St. 1893, c. 368, amended by subsequent acts, providing for the appointment of a board of three commissioners to apportion the cost of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven, made no provision for the payment of interest upon the amounts payable under the report of the commissioners to the Superior Court from the time of the filing of the report until the entry of judgment. *Held*, that R. L. c. 177, § 8, had no application, and that no interest before judgment could be charged. *Ibid*.
5. The commissioners appointed under St. 1893, c. 368, § 6, to apportion the cost of the bridge over the Acushnet River between the city of New Bedford and the town of Fairhaven were authorized by that section and by St. 1900, c. 439, § 7, to determine and name the cities and towns by which the expense of the care, maintenance and repairs of the bridge and draw with the approaches, abutments and piers should be paid, and also to determine and name the proportion of such expense that should be paid by each of such cities and towns. *Held*, that the determination of the commissioners in regard to the maintenance and support of the bridge was not subject to revision. *Ibid*.

## AGENCY.

### *What constitutes.*

Payment by debtor to assignor of account after notice by assignee to debtor of assignment is not binding upon assignee unless he knew of and acquiesced in it; circumstances held not to warrant finding that assignor was assignee's agent for receipt of payments, see **ASSIGNMENT**.

### *Validity of Contract constituting Agency.*

There is no lack of mutuality in contract of agent in distant State to perform services there for principal here because he undertakes to give to the transaction of the business "as much of his time as to him may seem necessary" in order to manage it properly and to "use his best judgment" in the matter, see **CONTRACT**, 3.

Contract under seal for employment of agent in distant State for management of principal's real estate interests there which contains provision that in case of death of principal before contract is completed his executor shall carry it out, and which is accompanied by letter containing further agreement of principal to add codicil to his will directing executor in accordance with contract, is not invalid as unlawfully interfering with settlement of principal's estate and is broken on executor's refusing to perform it, although promised codicil never was made, see **CONTRACT**, 5, 6.

*Scope of Employment or Authority.*

Action involving question whether boy employed in manufactory of jewelry was acting within scope of employment when dipping dangerous acid. with pitcher having broken handle, see NEGLIGENCE, 22.

Evidence held inadmissible and charge of presiding judge held proper in trial of action for price of lumber involving questions whether broker who purchased lumber was authorized by defendant to do so on his behalf, and whether broker's authority for purchasing was special in other instances, or general, and whether, if special, plaintiff had reason to believe from defendant's acts that it was general, see *post*, 4; EVIDENCE, 12, 22, 32; PRACTICE, CIVIL, 14, 15.

*Identity of Principal.*

1. In an action against two defendants named respectively A. and S. and alleged to be partners carrying on business under the firm name of A. S. and Company, for personal injuries alleged to have been caused by the negligence of the driver of a team of the defendants, there was ample and uncontradicted evidence that the driver of the team which injured the plaintiff was in the employ of A. S. and Company at the time of the accident, but the defendants contended and introduced evidence to show that this name was used by a certain corporation, and it did not appear that one of the defendants ever had been in the city where the accident occurred or that the other defendant was at the place of business of A. S. and Company except "once in a while." The manager of the business testified that the defendants "were simply stockholders in the corporation." Neither of the defendants appeared at the trial, and no charter of the alleged corporation was produced; there was no evidence of the proceedings for its incorporation nor were any of its books shown. *Held*, that the question of the connection of the defendants with the business in which the driver was employed was one for the jury. *Norris v. Anthony*, 225.

*Termination.*

2. A power of attorney to convey real estate which is not coupled with an interest in the real estate is terminated by the death of the constituent. Here it was conceded that a right to be paid a compensation from the proceeds of the sale of the real estate was not such an interest. *Mills v. Smith*, 11.

For contract for employment of agent personal and terminated at death of agent and thus not void as contrary to rule against perpetuities, see CONTRACT, 6.

Contract of employment of "sales agent" by lumber company held revocable at pleasure of company's directors, and agency terminated by company, see CONTRACT, 11, 21.



*Liability of Agent to Principal.*

Fiduciary relation which entitles principals to accounting in equity held to arise from appointment by owners of real estate of agent to manage property under irrevocable power for term of years according to specified conditions, see *EQUITY JURISDICTION*, 1, 2.

*Liability of Principal to Agent.*

8. In an action by a real estate broker for a commission on a sale of real estate belonging to the defendant alleged to have been effected by his services, it appeared that the plaintiff had introduced himself to the defendant as a broker who might sell the property for him, that subsequently he saw the son of one L. and thus obtained certain tentative offers for the property which were supposed by the plaintiff to be in behalf of L., who always was referred to by the plaintiff and L.'s son as the son's client, that the plaintiff himself never met L., and that the highest price thus authorized or named was \$175,000, that the plaintiff submitted to the defendant a "tentative proposition" of \$180,000, which was refused, the defendant naming \$185,000 as his price, that the defendant said to the plaintiff "Bring me an offer in writing, and perhaps we can get together," that about this time the defendant told the plaintiff that unless his clients hurried and got around within two or three weeks the negotiations would be off, that the plaintiff told the son of L. that his client would have to hurry if he was going to purchase the property, and that if anything was going to be done it would have to be done within two or three weeks, that afterwards L.'s son told the plaintiff that he had submitted the matter to his client and had no definite information, and the plaintiff thought that L. and his son had let the matter drop, that the two or three weeks mentioned by the defendant expired, and that shortly after this L. through a person other than the plaintiff procured an introduction to the defendant and they agreed upon a price of \$182,500 for the property, which L. purchased from the defendant for that sum. The defendant never had known that the offers reported by the plaintiff had come in any way from L. *Held*, that a verdict rightly was ordered for the defendant; that the only contract that could be found on the part of the defendant was to pay the plaintiff a commission if he procured a sale of the property, that the plaintiff failed to do this, and was discharged by the defendant, and that there was no possible question of the defendant's good faith in terminating the plaintiff's employment and afterwards selling the property to L., as the defendant did not know that L. had been the plaintiff's customer. *Smith v. Kimball*, 582.

Liability of principal for personal injuries to or causing death of agent during employment, see *NEGLIGENCE*, 7-24.

Evidence warranting inference that amounts of retainers were agreed upon between attorney and client, see *ATTORNEY AT LAW*.

Liability of principal and his executor to agent under contract under seal for employment of agent in distant State for management of principal's real estate interests there, see *CONTRACT*, 2, 3, 5, 6, 18.

*Liability of Principal to Third Person.*

Liability of principal to third persons for negligent acts of agent, see NEGLIGENCE, 1-6, 25-66, 68.

Fact that broker, who was agent for insurance company and procured for customer policy on building as dwelling house, had maps in office showing building insured to be partly store and partly dwelling house immaterial as affecting insurance company's non-liability on policy, although it might make broker liable to his principal for negligence, see INSURANCE, 2.

*Liability of Surety on Agent's Bond.*

In action against surety on bond of agent of insurance company for faithful performance of his contract with company, where defence is variation in terms of contract of agency since bond was given without knowledge and consent of surety, and where contract between agent and company was not fully described in bond, oral evidence offered by defendant to prove exact terms of agent's contract is admissible, see EVIDENCE, 31; and if change in conditions to which bond relates without knowledge and consent of surety is shown surety is discharged, see SURETY, 1, 2.

*Evidence of.*

4. In an action for the price of goods sold and delivered, where the plaintiff seeks to show the liability of the defendant by proving a sale to a broker alleged to have been the defendant's agent, if there is evidence that in all the transactions with the plaintiff in which the broker represented the defendant he was given special authority for each transaction and never acted under a general authority, it is proper for the presiding judge to refuse a request of the plaintiff for an instruction as to the effect of previous purchases, as a ground for inferring authority to make like purchases afterwards, which recognizes no difference between purchases made under a special authority for each occasion and purchases made as a general agent. *Rice v. James*, 458.

## ALIENATION OF AFFECTION.

1. In an action by a husband against the father of his wife for enticing her away, alienating her affections and harboring and secreting her, it is not enough for the plaintiff to show that the defendant performed the acts charged. The burden is upon him to show that the defendant was prompted by malice in what he said and did, and to overcome the presumption that the defendant acted under the influence of natural affection and for what he believed to be the good of his child. *Muller v. Knibbs*, 556.
2. In an action by a husband against the father of his wife for enticing her away, alienating her affections and harboring and secreting her, if there is evidence that the defendant, while his daughter was in his care, at first denied to the plaintiff that he had any knowledge of her whereabouts, and then refused to give the plaintiff any information, saying "I don't care anything about your wishes I am running this thing now," that the

defendant told one witness that he "came near kicking her out of the cellar" when he learned that she had married the plaintiff, and said that the plaintiff "couldn't see her, and that he had no right to see her," and told another witness that he was going to have his own way about this, that the plaintiff could not live with his girl, and that he would spend the last cent he had before he would consent to this man's having his daughter, that the defendant told the plaintiff's mother, when she said to him that she could not agree to the annulment of the marriage and wished there might be some reconciliation, "I don't care whether you agree to it or not, it is going as I say. You have had your way all the way through and now I want you to understand I shall have mine," and that when the plaintiff's mother said that she feared for his daughter's health he answered "Well, I don't," although the defendant introduces evidence tending strongly to show that he was actuated wholly by a desire to protect his daughter from the evils that might follow a hasty and ill-considered marriage and that his object was to secure her welfare, the question whether the defendant in what he did was actuated by malice toward the plaintiff is for the jury. *Multer v. Knibbs*, 556.

#### AMHERST COLLEGE.

Taxation of property of Amherst College involving questions whether proper notice was sent by assessors, see **TAX**, 12, 13.

Whether certain property was used for purposes for which college was incorporated within meaning of statute is exempt from taxation, see **TAX**, 15, 16.

#### APPEAL.

Appeal from Land Court, see **LAND COURT**.

Appeal from Police, District or Municipal Court, see **PRACTICE, CIVIL**, 27.

Appeal in equity, see **CONTRACT**, 8; **EQUITY JURISDICTION**, 2; **EQUITY PLEADING AND PRACTICE**, 4, 6, 10-15.

Appeal in civil cases from Superior Court, see **PRACTICE, CIVIL**, 3, 8, 25, 26.

Appeal from Supreme Judicial Court, see **PRACTICE, CIVIL**, 28.

#### ARCHITECT.

In action on *quantum meruit* by architect for compensation for services in making preliminary plans for building, testimony of plaintiff as to value of services is competent; letters of defendant to other architects as to competition in matter of plans offered to sustain defendant's contention that there was no contract of employment but an open competition, if not brought to plaintiff's knowledge, are inadmissible, see **EVIDENCE**, 13, 23.

#### ARMORY.

Sts. 1905, c. 465, §§ 110-123, and 1906, c. 504, § 9, providing for erection and maintenance of armories and taxation therefor, are constitutional, see **CONSTITUTIONAL LAW**, 19, 20.

## ARREST.

Rights of constable authorized to serve criminal process injured after alighting from railroad train which he entered without warrant for purpose either of examining persons abroad or of apprehending criminals, see **CONSTABLE**, 1-4.

## ASSESSMENT.

See **TAX**, 1-10.

## ASSIGNMENT.

In an action of contract by a bank for the price of goods sold and delivered to the defendant by the plaintiff's assignor, a corporation which had become bankrupt, it appeared that the plaintiff before the bankruptcy from time to time had discounted certain notes of the plaintiff's assignor and had taken as security an assignment of the accounts sued upon, and that the defendant in spite of notice from the plaintiff of each assignment had paid the money due on the accounts to the plaintiff's assignor at its request. The defendant introduced evidence tending to show that it had become the regular course of business between the defendant and the plaintiff's assignor for the defendant to pay the money due on the accounts to the assignor after the assignments, although in the majority of cases where these payments were made the loans to secure which the accounts had been assigned had not been paid. There was no evidence that the plaintiff authorized any of these payments and its officers testified that they had no knowledge that the payments were made, although the plaintiff's president testified that the bank might have given the defendant an occasional oral reminder that the amount had not been paid and should be, and the plaintiff's vice-president testified that complaint had been made from time to time to the treasurer and assistant treasurer of the assignor that debtors did not remit directly to the plaintiff as they should do although he was unable to say whether such complaint was made in regard to the defendant. The judge, before whom the case was tried without a jury, found for the plaintiff. *Held*, that the finding for the plaintiff was warranted; that, even if the course of business between the defendant and the plaintiff's assignor was as contended by the defendant, there was no such knowledge of and acquiescence in it on the part of the plaintiff as to estop the plaintiff from denying that the payments to its assignor had been made by its authority; and that the extent to which the plaintiff knew or had reasonable cause to know the course of business between its assignor and the defendant was a question of fact to be determined by the judge who heard the case. *City Bank of New Haven v. Wilson*, 164.

**ATTACHMENT.***By Supplementary Process.*

No attachment by special precept in the Superior Court under R. L. c. 167, § 80, can be made by trustee process unless one of the persons summoned as trustees dwells or has his usual place of business in the county where the action is pending, as required by R. L. c. 189, § 2. *Daniels v. Clarke*, 84.

**ATTORNEY AT LAW.**

In an action for services as an attorney at law, where an auditor has found that certain sums of money received by the plaintiff properly were credited by him as retainers and the auditor's report shows that the payments were demanded as retainers and were sent by the defendant to the plaintiff as retainers, the inference is warranted that the amounts of these retainers were agreed upon between the parties. *Blair v. Columbian Fireproofing Co.* 540.

Rule of evidence excluding confidential communications between attorney and client does not extend to statement made by attorney to his client of what witness at hearing before master testified to in matter affecting client's interests, see EVIDENCE, 17, 18.

Fact that member of bar advising officers of Massachusetts corporation as to methods of payment for capital stock and as to certificates to be sworn to by them was himself holder of stock in the corporation which he paid for in cash does not incapacitate him from giving advice to officers, see EQUITY JURISDICTION, 9.

**BANKRUPTCY.***Contingent Claims.*

1. In an action to recover money paid by the plaintiff as surety on the defendant's bond given in another action to dissolve an attachment, the defence relied upon was the defendant's discharge in bankruptcy. It appeared that the defendant went into bankruptcy and was discharged between the bringing of the action on the bond and the recovery of judgment, and that the plaintiff had no notice or actual knowledge of the bankruptcy proceedings. *Held*, that at the time of the adjudication in bankruptcy the plaintiff's claim was a contingent one and as such was not provable under the bankruptcy act of 1898, and so was not discharged. Following *Goding v. Rosenthal*, 180 Mass. 43. *Smith v. McQuillin*, 289.

*Staying of Suits Pending against Bankrupt.*

2. The fact that a defendant has been defaulted does not deprive him of the right to file a motion for a continuance based on a suggestion of his bankruptcy and to have such motion heard. *American Wood Working Machinery Co. v. Furbush*, 455.

3. When the last entries in the record of an action are a suggestion by the defendant of his bankruptcy and a motion for a continuance founded thereon, under the bankruptcy act of 1898 the case is not ripe for judgment until the motion is passed upon by the court. *American Wood Working Machinery Co. v. Furbush*, 455.
4. The provisions of the bankruptcy act of 1898, c. 541, § 11, in regard to the staying of pending suits against a bankrupt founded on claims to which a discharge would be a release, require the court to grant a continuance in cases within the terms of the act, unlike the corresponding provisions of the insolvency act which leave the granting of a continuance to the discretion of the court. *Ibid.*

*Liability of Person illegally receiving Funds from Bankrupt after Insolvency.*

Case involving liability of one, who illegally had been paid sum of money by manager of co-operative society for "withdrawal of shares" when society was insolvent, to pay back sum to trustee of society in bankruptcy, see EVIDENCE, 26; CO-OPERATIVE SOCIETY.

*New Promise after Discharge.*

Construction of promise in writing of debtor made after his bankruptcy to pay debt barred by his discharge in bankruptcy as to satisfaction of statute of frauds and as to creditors' rights thereunder, see FRAUDS, STATUTE OF, 7-9; CONTRACT, 15.

BASTARDY.

Appeal from judgment of Superior Court overruling plea in abatement in bastardy proceeding under R. L. c. 82, entered before St. 1902, c. 342, § 2, was in force, plea being based on lack of allegation in complaint in Municipal Court that defendant either resided or had usual place of business in district of that court, held not to lie under R. L. c. 173, § 96; and, if plea could be treated as motion to dismiss, motion was held rightly denied since such proceedings were initiatory only in lower court and case was really in Superior Court which had jurisdiction if either complainant or defendant resided in county or judicial district where case was heard, see PRACTICE, CIVIL, 1-3.

BETTERMENT.

See TAX, 1.

BILLS AND NOTES.

*Liability of Indorser.*

1. If an indorser of a note, after the time for making a demand on the maker required to charge him as indorser has expired without such a demand having been made, signs upon the back of the note a waiver of "demand, notice and protest," knowing the facts which have released him from liability but in ignorance of their legal effect, such ignorance in the

absence of fraud does not save him from the consequences of his waiver. *Toole v. Crafts*, 110.

2. In an action against the indorser of a promissory note, if it appears that, after the time for making a demand on the maker required to charge the defendant as indorser had expired without such a demand having been made, the defendant signed upon the back of the note a waiver of "demand, notice and protest," and the defendant contends that his signing of the waiver was procured by false and fraudulent representations made to him by the attorney of the plaintiff, the defendant may show by his own testimony that at the time he signed the waiver, although he knew the facts, he did not know their legal effect and was not aware that he had been relieved from liability on the note, such evidence of the operation of his mind being admissible upon the question whether the representations made to him by the attorney of the plaintiff were the effective inducement of his action. *Ibid.*

#### *Days of Grace.*

Proof of law of other State as to days of grace on negotiable paper, see EVIDENCE, 8, 15.

### BOND.

#### *Probate Bond.*

Liability of executor on probate bond, see EXECUTOR AND ADMINISTRATOR, 6-9.

#### *Liability of Surety.*

Surety on bond of agent of insurance company for faithful performance of his duties to company is discharged from further liability by substantial change in conditions to which bond relates without his knowledge and consent, see SURETY, 1, 2.

In action against surety on bond of agent of insurance company for faithful performance of his contract with company, where defence is variation in terms of contract of agency since bond was given without knowledge and consent of surety, and where contract between agent and company was not fully described in bond, oral evidence offered by defendant to prove exact terms of agent's contract is admissible, see EVIDENCE, 31.

#### *Surety's Right to Reimbursement.*

Action to recover money paid by plaintiff on judgment in action against him as surety on defendant's bond given to dissolve attachment in another action can be maintained although between time of bringing of action on bond and of recovery of judgment defendant was adjudicated bankrupt, see BANKRUPTCY, 1.

### BOSTON.

#### *Officers and Agents.*

The building commissioner of the city of Boston, and the members of the board of appeal from his decisions, are not judicial officers. *Welch v. Swasey*, 364.

Janitor of police station in Boston is not police officer nor member of police department nor subordinate of officer or board of city, and veteran not registered with civil service commissioners so employed before such employment was included in list to be filled by certificates from such commissioners may be discharged without cause; but not so after he is registered and the employment is put on such list, see MUNICIPAL CORPORATIONS, 1, 2; VETERAN, 1, 2.

*Assessment for Benefits from Sewer Construction.*

Assessment for benefits from construction of sewers in city of Boston where such sewers were included in order for laying out and construction of street under St. 1891, c. 323, and acts in amendment thereof, can be made only under St. 1902, c. 521, after completion of improvements of which sewer is part, see TAX, 1.

*Building Laws.*

Consideration of St. 1904, c. 333, dividing city of Boston into districts and regulating height of buildings in various districts, the boundaries of the districts to be determined by commission created by act, and of St. 1905, c. 383, giving further powers to commission for like purposes, with regard to constitutionality as proper exercise of police power and not improper delegation of legislative power, see CONSTITUTIONAL LAW, 3-6, 12-17.

BRIDGE.

Construction of St. 1900, c. 439, §§ 6, 7, relating to relocation and completion of Acushnet River bridge between New Bedford and Fairhaven, see ACUSHNET RIVER BRIDGE, 1-5.

Whether absence of railings or barriers at sides of bridge over brook is defect, see WAY, 1.

Due care of one driving blind horse in buggy across bridge without railings or barriers at sides, see NEGLIGENCE, 64.

BRISTOL COUNTY.

Construction of § 6 of St. 1900, c. 439, relating to relocation and completion of Acushnet River bridge between New Bedford and Fairhaven with regard to apportionment of cost, see ACUSHNET RIVER BRIDGE, 2-5.

BROCKTON STREET RAILWAY COMPANY.

Construction of St. 1901, c. 214, § 3, with regard to power of Brockton Street Railway Company to maintain poles and wires for transmission of electricity in streets through which it is not authorized to operate railway, see OLD COLONY STREET RAILWAY COMPANY.



**BROKER.***Taxation.*

Stock in corporation pledged to broker under agreement with customer for whom broker purchased it is not taxable to broker, see **TAX**, 5-7.

Capital used by stockbroker in business is taxable to him where he has his home and not where he has place of business, see **TAX**, 4.

*Effect of Knowledge of Broker.*

Fact that broker, who was agent for insurance company and procured for customer policy on building as dwelling house, had maps in office showing building insured to be partly store and partly dwelling house immaterial as affecting insurance company's non-liability on policy, although it may make broker liable to his customer for negligence, see **INSURANCE**, 2.

*Commission.*

Real estate broker held, on facts, not to have earned commissioid for sale of defendant's real estate, see **AGENCY**, 3.

**BUILDING LAWS.**

St. 1904, c. 333, and St. 1905, c. 383, dividing city of Boston into districts and regulating height of buildings in different districts held constitutional, see **CONSTITUTIONAL LAW**, 3-6, 12-17.

**CAMP MEETING.**

Charter of Onset Bay Grove Association, corporation created by St. 1877, c. 98, held to give corporation power to use property as summer resort and provide for camp meeting of spiritualists, see **CORPORATION**, 1.

**CARRIER.***Of Goods.*

Duty of railroad company as common carrier of goods as to providing proper place for delivery, and liability when it chooses to deliver from car in freight yard and car proves defective, although car belongs to another company, see **NEGLIGENCE**, 61-63.

*Of Passengers.*

1. A passenger being transported by a common carrier has a right to assume that the carrier has adopted and maintains a reasonably safe mode of transportation. *Pomeroy v. Boston & Northern Street Railway*, 507.
2. It is the duty of a common carrier of passengers to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of the high degree of diligence and care toward its passengers to which such a carrier is held, it reasonably ought to have anticipated. *Kuhlen v. Boston & Northern Street Railway*, 341.
3. Whether a motorman in the employ of a street railway company while

being carried on a car of the company upon an errand of his own after his day's work is done, under a pass by the terms of which he assumes all risk of accidents, has the rights of a passenger for hire, depends on the question of fact whether the pass was given him as a gratuity or whether it was issued to him as one of the terms of his employment; in which last case the clause in regard to his assumption of risk is not binding and he has the rights of a passenger for hire. *Dugan v. Blue Hill Street Railway*, 431.

4. In an action against a street railway company for personal injuries incurred by a motorman in the employ of the defendant while being carried on a car of the defendant upon an errand of his own after his day's work was done, it appeared that the plaintiff was travelling on a pass by the terms of which he assumed all risk of accidents, that when the plaintiff first was employed by the defendant all employees while travelling for pleasure or on their personal business were transported free without passes, that at a time two or three years before the accident when the plaintiff went for his week's pay the paymaster threw out with the envelope containing his pay a pass like the one on which the plaintiff was travelling at the time of the accident, and that each year after that a similar pass was issued in renewal of it. The defendant asked the presiding judge to rule that the plaintiff was not a passenger for hire. The judge said, "This seems to be a question of law," to which the defendant assented. Thereupon the judge refused the request. In charging the jury the judge ruled that as matter of law the plaintiff was a passenger for hire, saying, "I have to rule one way or the other, it being agreed to be a question of law." The defendant did not object to this statement of the judge, but excepted to the ruling. *Held*, that whether the plaintiff was a passenger for hire was a question of fact depending on whether the pass was given him as a gratuity or was issued to him as one of the terms of his employment, so that the refusal to rule as matter of law that the plaintiff was not such a passenger was correct; that the defendant by assenting to the statement of the judge, either must be taken to have agreed that the judge should rule on the question of fact as if it were a question of law, and in this case the defendant's exception to the ruling that the plaintiff was a passenger for hire must be overruled, as on the question of fact this court could not say that the judge came to the wrong conclusion, or the defendant's counsel must be taken to have asked the judge to rule on the question as one of law because if it was a question of fact he did not care to go to the jury on it, in which case also the exception must be overruled. *Ibid*.

Liability of street railway company as carrier of passengers for injury resulting from negligence of itself or its servants or employees, see NEGLIGENCE, 25-40.

Liability of railroad company as carrier of passengers for injury resulting from negligence of itself or employees, see NEGLIGENCE, 56-60.

Whether street railway company using a force so imperfectly understood as electricity as motive power might not be liable for injury to passenger caused by flash from controller although flash could not have been prevented by any means yet devised, see NEGLIGENCE, 31.

Not duty of conductor of street car stopped for passengers to alight on street

Carrier (*continued*).

- of country town to warn woman passenger about to alight of existence of gutter between car and sidewalk, see NEGLIGENCE, 40.
- Semble*, that conductor and brakeman of railroad train are not under duty to assist intoxicated person from train; but, *held* that if they do so, they are under duty to use due care not to leave him in perilous position, see NEGLIGENCE, 59, 60.
- Duty of street railway company to protect passengers does not extend to exercising on Fourth of July supervision of details of firing of cannon and of other demonstrations of patriotic emotion by citizens along line of highway through which its cars pass, and company is not liable if passenger is struck by wadding of cannon thus fired, see STREET RAILWAY, 2; NEGLIGENCE, 37.
- Rights of constable as officer of watch authorized to serve criminal process entering railroad train without a warrant with purpose either of examining persons abroad or of apprehending criminals, see CONSTABLE, 1-4.

#### CHARITY.

1. A trust to maintain an unincorporated institution called a home for the sole purpose of affording free education and maintenance for deserving and destitute boys is a valid public charity. *Farrigan v. Pevear*, 147.
  2. A fund of which the income is to be devoted to religious uses in connection with a particular church is a public charity. Following *Osgood v. Rogers*, 186 Mass. 238, and declaring that anything to the contrary in *Parker v. May*, 5 Cush. 336, and *Old South Society v. Crocker*, 119 Mass. 1, has been overruled by the later decisions. *Sears v. Attorney General*, 551.
  3. A fund was established by the contributions of persons connected with a particular church and religious society, the income of which was to be used to provide for the widow and minor children of a deceased bishop and rector of that church, then to be used for the support of the widow or orphan children of any rector of the same church, and, if by accumulations the fund should yield an income of more than \$1,000, then funds were to be created for the widows and minor children of the assistant minister of the same church, and next for the support of the dignity of the bishop of Massachusetts when such bishop should be the rector of the same church, and then for the use and benefit of the bishop, rector, assistant minister or such other object connected with the same church as the wardens and vestry thereof for the time being might deem advisable. *Held*, that the fund constituted a public charity, and that on a proper case being made out the court would direct its administration *cy pres*. *Ibid*.
- Trustees of charity not liable for injuries caused by negligence of servants properly selected, see NEGLIGENCE, 66.

#### CHATTEL.

##### *Life Interest.*

The questions, whether the owner of a building which is personal property can create a life interest in it in favor of another with a reversion in him-

self, and, if so, whether such an interest can be created orally, here were not passed upon, the court assuming that such an interest could be created and could be created orally, for the purpose of deciding the case upon the point that the oral arrangement alleged to have transferred a life interest in the building was merely an executory contract. *Durfee v. Meadowcroft*, 267.

### CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

### CIVIL SERVICE.

On petition for writ of mandamus to compel reinstatement as messenger in printing department of city of veteran alleged to have been ousted wrongfully from his employment under colorable abolition of office, questions of validity and waiver of notices, of laches and of damages were considered, see VETERAN, 4-8.

Petition for writ of mandamus will lie to compel reinstatement of laborer employed by city under R. L. c. 19, §§ 23, 24, and civil service commissioners' rules if he is wrongfully discharged while there is work to be done of the kind for which he was employed although he has brought action of contract against city to recover wages due him since wrongful discharge, see VETERAN, 3.

Janitor of police station in Boston is not police officer nor member of police department nor subordinate of officer or board of city, and veteran, not registered with civil service commissioners, so employed before such employment was included in list to be filled by certificates from such commissioners may be discharged without cause; but not so after he is registered and the employment is put on such list, see MUNICIPAL CORPORATIONS, 1, 2; VETERAN, 1, 2.

### CLOUD ON TITLE.

Supreme Judicial Court and Superior Court still have jurisdiction over suits in equity to remove cloud from title, such jurisdiction not having been transferred to Land Court by St. 1904, c. 448, § 1, see EQUITY JURISDICTION, 6.

Cloud on title produced by absolute deed of land made in order that grantee may mortgage land to secure grantor's debt, after grantee has executed and delivered mortgage, cannot be removed by suit in equity, see EQUITY JURISDICTION, 7.

### COLLEGE.

Questions of taxation of property of Amherst College depending upon whether property was used for purposes for which college was incorporated within meaning of statute, see TAX, 15, 16.

### COMMONWEALTH.

1. The Commonwealth cannot be impleaded in its own courts except by its consent clearly manifested by an act of the Legislature. *Hodgdon v. Haverhill*, 408.

Commonwealth (*continued*).

2. The Commonwealth cannot be made a defendant in a suit in equity under R. L. c. 25, § 100, by ten taxable inhabitants of a city or town, to restrain the alleged unlawful raising or expenditure of money or incurring of obligations. *Hodgdon v. Haverhill*, 406.

Release by civil engineer, employed by board of commissioners to take charge of and inspect certain work in behalf of Commonwealth, of Commonwealth from liability for injury caused by negligence of employee of one doing work under contract with Commonwealth does not release contractor, see RELEASE, 1-3.

Commonwealth liable to repay tax on land to lessee from it of part of Commonwealth Flats for business purposes under lease made before St. 1904, c. 385, whereby lessee covenanted to pay taxes on improvements placed on land by him which parties to lease agreed to consider as personal property and Commonwealth covenanted for lessee's quiet enjoyment, see LANDLORD AND TENANT, 1.

### COMMONWEALTH FLATS.

Part of Commonwealth Flats held under bond for deed from Commonwealth and used for business purposes is not taxable as leased land under St. 1904, c. 385, see TAX, 14.

Commonwealth held liable to repay tax on land to lessee from it of part of Commonwealth Flats for business purposes under lease made before St. 1904, c. 385, whereby lessee covenanted to pay taxes on improvements placed on land by him which parties to lease agreed to consider as personal property and Commonwealth covenanted for lessee's quiet enjoyment, see LANDLORD AND TENANT, 1.

### CONSTABLE.

1. Enumeration by *Rugg, J.*, of statutes under which a constable authorized to serve criminal process may make an arrest without a warrant. *Creeden v. Boston & Maine Railroad*, 280.
2. A passenger on a train of a railroad company who has placed himself in the hands of the carrier for transportation is not "abroad" within the meaning of R. L. c. 31, § 2, authorizing watchmen appointed under that chapter during the night-time to "examine all persons abroad whom they have reason to suspect of an unlawful design" and to arrest persons so suspected who do not give a satisfactory account of themselves. *Ibid*.
3. A constable, who is an officer of the watch authorized to serve criminal process, entering a passenger train of a railroad company in the night-time for the alleged purpose "of examining certain persons abroad" whom he has reason to suspect of an unlawful design, has no rights against the railroad company greater than those of a mere licensee, and the company is under no obligation to furnish a safe place for him to alight from the train, passengers in a railroad train not being "persons abroad" within the meaning of R. L. c. 31, § 2. *Ibid*.
4. If a constable, who is an officer of the watch authorized to serve criminal process and has been informed and believes that criminals are escaping in

a train of a railroad company which is stopping at a station, enters the train, not to serve a warrant but "for the purpose of apprehending said criminals," he has no rights against the railroad company greater than those of a mere licensee, and the company is under no obligation to furnish a safe place for him to alight from the train, there being many persons properly described as criminals whom he would have no right to arrest without a warrant. *Creeden v. Boston & Maine Railroad*, 280.

## CONSTITUTIONAL LAW.

### *Effect of Unconstitutionality of Part of Statute.*

1. Section 7 of St. 1897, c. 426, relative to the sewerage works of the city of Boston, providing for the assessment of benefits, which was declared unconstitutional in *Sears v. Street Commissioners*, 173 Mass. 350, was so important a part of that statute, that the provisions of §§ 1 and 8 of the same chapter, that no sewerage work should thereafter be constructed in that city except under authority of that act, unless ordered before its passage, and that all sewers and connections made in constructing any way under St. 1891, c. 323, should be deemed to be constructed under the act of 1897, fall with the unconstitutional provisions of § 7 and are of no effect. *Tappan v. Street Commissioners*, 498.
2. The provision in § 1 of St. 1899, c. 450, relative to the sewerage works of the city of Boston, that no sewerage work should thereafter be constructed in that city except under the authority of that act, unless ordered before its passage, was a re-enactment of § 1 of St. 1897, c. 426, which was void as connected inseparably with an unconstitutional provision in another section of that statute, and therefore first became effective under the statute of 1899. *Ibid.*

Provisions of statutes relating to reconstruction and extension of State House and adjoining park and those of same statutes limiting height of buildings not separable on question of constitutionality, see *post*, 18.

### *Delegation of Legislative Power.*

3. The power to make rules and regulations in the nature of subsidiary legislation may be delegated by the Legislature to a local board or commission, such rules being subject to be tested in the courts to determine whether they reasonably are directed to the accomplishment of the lawful purpose of the statute under which they were made. *Welch v. Swasey*, 364.
4. A provision in an order of the commission appointed under St. 1905, c. 383, regulating the height of buildings in the portion of the city of Boston designated as residential under authority of St. 1904, c. 333, that buildings may be erected on streets exceeding sixty-four feet in width to a height equal to one and one quarter times the width of the street upon which the building stands, and not exceeding one hundred feet in any event, is not outside the constitutional power of the commission. *Ibid.*
5. The provision of St. 1904, c. 333, § 2, by which the Legislature delegated

Constitutional Law (*continued*).

to the commission on the height of buildings in the city of Boston, thereby created, the power to determine for a period of fifteen years the boundaries of the two districts of the city of Boston provided for by that statute, in one of which the height of buildings is restricted by the statute to one hundred and twenty-five feet and in the other to eighty feet, is constitutional, this work of the commissioners being not legislation but the ascertainment of facts and the application of the statute to them for purposes of administration. *Welch v. Swasey*, 364.

6. The provisions of St. 1905, c. 383, delegating to the commission, whose appointment thereby was directed, the power to fix different heights between eighty and one hundred feet and between eighty and one hundred and twenty-five feet at which buildings might be erected in different places in the district in the city of Boston established under St. 1904, c. 333, within which buildings were limited to the height of eighty feet, and to name the conditions under which buildings might be erected at the heights fixed by them in the places designated by them, are constitutional, and all reasonable regulations made by the commission directed to the proper accomplishment of the purpose of the statute will be enforced. *Ibid*.

*Police Power.*

To prohibit unfair competition.

7. A statute restricting the rights of contract of the owners of letters patent from the United States as distinguished from the owners of other property would not be constitutional. *Opinion of the Justices*, 805.
8. The enactment of a statute of general application, including persons entitled to rights under letters patent from the United States with the rest of the community, which has the effect of preventing the holder of a monopoly derived from letters patent from imposing conditions on the sale or lease of the patented article which create other monopolies not granted to him by federal authority, is within the police power of the Legislature. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices. *Ibid*.
9. It is within the constitutional power of the Legislature to enact a law of general application producing the result that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, shall not lease and license the use of machines embodying the patented invention, upon conditions which are, when agreed to by the lessee and licensee, in effect, a prohibition upon the lessee and licensee from obtaining of any person other than the lessor and licensor machines for performing the same operation as that performed by the leased and licensed machine, during the term of such lease and license. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices. *Ibid*.
10. It is within the constitutional power of the Legislature to enact a law of general application producing the result that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, where he has certain patented machines designed to perform two certain successive steps in making an article or product, shall not lease

and license the use of one of the machines, which is designed to perform one of the steps, upon conditions which are, when agreed to by the lessee and licensee, in effect a prohibition upon the lessee and licensee from using, in the manufacture of such article or product, the leased and licensed machine, if a machine not obtained from the lessor and licensor is or is to be used to perform the other of the steps, during the term of the lease and license. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices. *Opinion of the Justices*, 605.

11. It is within the constitutional power of the Legislature to enact a law of general application producing the result that the owner of or a licensee under letters patent of the United States, doing business in this Commonwealth, shall not lease and license the use of a machine embodying the patented invention, upon the conditions, when agreed to by the lessee and licensee, that the latter, as rental for the machine and as royalty for the use of the patented invention, shall purchase from the lessor exclusively material or merchandise to be used in the machine, during the term of such lease and license. KNOWLTON, C. J. & MORTON, J., differing in opinion from the other justices. *Ibid.*

Limitation of height of buildings in city.

12. The Legislature in the exercise of the police power can limit the height of buildings in a city in which they determine that the public health or the public safety requires such a limitation. *Welch v. Swasey*, 364.
13. In a city in which the Legislature have determined that the public health or the public safety requires the limitation of the height of buildings they may establish different heights for different neighborhoods according to their conditions and the uses to which the property in them is put. *Ibid.*
14. In a city in which the Legislature have determined that the public health or the public safety requires the limitation of the height of buildings, it is reasonable to allow buildings to be constructed to a greater height in those parts of the city where most of the buildings are used for purposes of business or commerce than in those parts where most of the buildings are used for residences, even if some of the streets in the business portion of the city are narrower than those in the residential portion. *Ibid.*
15. The provisions of St. 1904, c. 333, that the city of Boston shall be divided into districts of two classes, in one of which all or the greater part of the buildings are used for business or commercial purposes, and in the other of which all or the greater part of the buildings are used for residential purposes or for other purposes not business or commercial, that in the first district no building shall be erected to a height of more than one hundred and twenty-five feet and that in the second district no building shall be erected to a height of more than eighty feet, are constitutional. *Ibid.*
16. *Semble*, that, although the Legislature have no power to restrict the uses of private property for purely aesthetic purposes, yet when they have determined that the public health or the public safety requires the limitation of the height of buildings in a city, in exercising the police power for such lawful purposes they also may consider questions of taste and beauty. *Ibid.*



17. This court cannot say that a provision in an order of the commission appointed under St. 1905, c. 383, regulating the height of buildings in the portion of the city of Boston designated as residential under authority of St. 1904, c. 333, that "no building shall be erected to a height greater than eighty feet unless its width on each and every public street on which it stands will be at least one-half its height," was made entirely for aesthetic reasons; and therefore such a provision is not unconstitutional. *Welch v. Swasey*, 364.

#### Abolition of grade crossings.

- St. 1900, c. 439, § 6, apportioning part of cost of completion of Acushnet River bridge between New Bedford and Fairhaven upon Old Colony Railroad. Company above road of which such bridge passes instead of crossing it at grade is constitutional, see ACUSHNET RIVER BRIDGE, 1.

#### Eminent Domain.

18. A petitioner for damages on account of the limitation of the height of buildings on Bowdoin Street in Boston, under the provision of St. 1902, c. 543, § 2, giving damages to any person owning land on specified parts of certain streets "whose property is damaged more than it is benefited by the improvement of the State House, consisting of the limitation of the height of buildings on said land, the laying out and grading of said streets, the removal of buildings between Hancock Street and Bowdoin Street, the reconstruction and extension of the State House and the construction of the park between Bowdoin Street and the State House," is estopped from maintaining that the part of the statute requiring the deduction of the benefit received from previous improvements made under different statutes is unconstitutional; as the petitioner has no standing in court except by the terms of the part of the statute requiring such deduction; and also because the different parts of the statute are not separable and the court cannot say that the Legislature would have imposed the limitation on the height of buildings unless they had assumed that they could treat the changes made under different statutes as one general improvement and could make the restriction upon buildings a part of the improvement. *Whether* it would be held, in case any one had the right to raise the question, that the Legislature thus could limit the compensation for a right of property taken to its value diminished by the value of the benefit received by the remaining estate from the general improvement, was declared to be a grave question which the court did not find it necessary to decide. *American Unitarian Association v. Commonwealth*, 470.

#### Militia Laws.

19. The Legislature reasonably may treat the construction of armories as necessary for the maintenance of the militia in suitable efficiency, and accordingly they may order that public money raised by taxation shall be applied for this purpose. *Hodgdon v. Haverhill*, 406.
20. The provisions relating to armories embodied in St. 1905, c. 465, §§ 110-123, and as now in force contained in St. 1906, c. 504, § 9, providing in

substance that, if the city council of any city shall vote to have an armory constructed therein and shall designate the amount of the loan necessary therefor, the armory commissioners of the Commonwealth shall acquire a suitable lot of land in that city and erect thereon an armory at the expense of the Commonwealth, that to meet such expense the Commonwealth shall issue its bonds as described in the statute, and that the amount required each year to pay the interest on such bonds and to establish a sinking fund for their final retirement shall be assessed by the Commonwealth upon the city until the debt has been extinguished, are constitutional. *Hodgdon v. Haverhill*, 406.

*Laws imposing Taxes.*

Taxation for construction of armories, see *ante*, 20.

St. 1897, c. 419, now R. L. c. 26, §§ 26, 27, authorizing assessments for watering streets in cities, is constitutional as applied to occupied estates in central portion of large city, see *TAX*, 2.

CONTRACT.

*What constitutes.*

1. An offer under seal does not become a contract unless it is accepted. *Averill v. Boston*, 488.  
Action of contract will not lie for sufferance rent on allegations that defendant forcibly entered plaintiff's close, appropriated part thereof for sidewalk purposes and continued in possession thereof for nearly twenty years, see *PLEADING, CIVIL*, 2.

*Consideration.*

2. In an action to enforce a promise contained in an instrument under seal reciting the receipt of a valuable consideration the defence of a want of mutuality is not open. *Mills v. Smith*, 11.
3. In a contract between the owner of lands in a distant State, the title to some of which is incumbered, to pay for the services of a citizen of that State in clearing the title to the lands and disposing of them, there is no lack of mutuality by reason of a provision in the contract that the person who is to perform the services agrees to give to the transaction of the business "as much of his time as to him may seem necessary" in order to manage the business properly and to "use his best judgment" in the disposition of the property and the settlement of all matters in dispute in regard to it. *Ibid.*

*Validity.*

4. A contract by a married man by which he transfers a substantial sum of money, which practically is all the property he has, to a certain person upon the agreement and understanding that the donee shall hold and care for the money and pay therefrom any sums required for the support of the donor or which he may demand, and that on the death of the donor any sum remaining in the hands of the donee shall become his property, is not invalid as against the widow of the donor. *Lindsey v. Bird*, 200.

Contract (*continued*).

5. A contract between the owner of lands in a distant State, the title to some of which is incumbered, to pay for the services of a citizen of that State in clearing the title to the lands and disposing of them, which expressly provides that in case of the death of the landowner before the contract is completed the executor of his will shall be required to carry it out, is not invalid on the ground that it unreasonably and unlawfully interferes with the settlement of the landowner's estate, it being within the power of a testator to provide for a disposition or use of his property after his death which will prevent the final settlement of his estate for a long time. *Mills v. Smith*, 11.
6. In a contract between the owner of lands in a distant State, the title to some of which is incumbered, to pay for the services of a citizen of that State in clearing the title to the lands and disposing of them, which expressly provides that in case of the death of the landowner before the contract is completed the executor of his will shall be required to carry it out, there is nothing contrary to the rule against perpetuities, because the contract being one to pay for personal services must terminate at the death of the person employed if not completed earlier. *Ibid*.
7. The sale of a business carried on in a city in this Commonwealth, consisting of manufacturing and dealing in needles, awls, drivers and like articles used in manufacturing boots and shoes, to a corporation engaged in manufacturing and selling machinery and devices for manufacturing boots and shoes, including needles, awls, drivers and like articles and conducting this business in all parts of the world where shoes are made by machinery, expressly including the good will of the business sold with a covenant on the part of the seller not to engage in or be interested in any business which consists in whole or in part in manufacturing or dealing in needles, awls or drivers for a period of fifteen years and without restriction as to place, where the time limit has been found as a fact not to be unreasonable, is valid, and the seller's negative covenant will be enforced against him in equity. *United Shoe Machinery Co. v. Kimball*, 351.
8. In a suit in equity by a manufacturer of shoe machinery, conducting business in all parts of the world where shoes are made by machinery, against a manufacturer of certain articles used in manufacturing shoes, who had been engaged in that business in a city in this Commonwealth and had sold out his business and its good will to the plaintiff with a covenant not to manufacture or deal in the articles formerly made by him for a period of fifteen years, to enforce by injunction the negative covenant of the defendant, if the defendant relies on the defence that the sale and the covenant were procured by fraud on the part of the plaintiff, and the only evidence in support of this defence is that there had been competition between the plaintiff and the defendant in the sale of the kind of articles manufactured by the defendant and that the plaintiff's agent had told the defendant what difficulties he would encounter in conducting his business against the plaintiff's competition, a finding of the justice who heard the case that the matters relied on to show fraud were only such as legitimately might result from competition where each party was

striving to obtain an advantage over the other by the usual methods of business, and that there was no fraud or mistake in the making of the sale and covenant, will not be disturbed on appeal. *United Shoe Machinery Co. v. Kimball*, 351.

9. In an action for goods sold and delivered, it appeared that the defendant ordered the goods upon a printed blank of the plaintiff, which he signed after having had an ample opportunity to read and understand it. In this instrument it was stated that the signer had "no agreement or understanding with salesman except as printed or written on this order" and that separate verbal or written agreements with salesmen were not binding upon the plaintiff, also that all conditions of sale must be shown on the order, "this sale being made under inducements and representations herein expressed and no others." The defendant offered evidence that he bought the goods upon certain oral representations made by a salesman of the plaintiff and that he shipped back the goods to the plaintiff when he found that the representations were false. The trial judge ruled that the defence that the defendant was induced to enter into the contract by false representations of the plaintiff's agent was not open to the defendant, and that the evidence to that effect offered by the defendant was immaterial. *Held*, that the ruling was right; that the contract was valid and binding, and that by it the defendant expressly had agreed that no salesman of the plaintiff had authority to change the terms of the contract in writing by any inducements or representations. *Cannon v. Burrell*, 534.

Opinion of justices as to constitutionality of proposed legislation restricting making of certain contracts for lease of patented machinery, see CONSTITUTIONAL LAW, 7-11.

Whether certain contract of sale is void as within meaning of St. 1903, c. 415, with regard to sales of merchandise in bulk, see SALES OF MERCHANDISE IN BULK, 1, 2.

#### *Construction.*

Whether conveyance or executory contract.

10. A wooden building standing on leased land was owned as personal property by a woman with a husband and two daughters. The owner died leaving a will, not assented to by her husband, bequeathing all her property to her daughters equally. One of the daughters was appointed administratrix with the will annexed. The surviving husband made an arrangement with his daughters by which "he transferred all his interest in his wife's estate to them, and they agreed that he should take charge of the wooden building, collect the rents, pay all the expenses, and from the balance left, if any, should keep \$3 a week for his living expenses, and pay over the remainder" to the administratrix. This arrangement was to continue during his life and the estate was not to be settled until after his death. He took possession of the building and continued to occupy it, collecting and receipting for the rents in his own name, settling losses with insurance companies, paying the charges and taking out the \$3 a week, after which there was nothing left to be paid to the administratrix. A judgment creditor of the surviving husband seized and sold his alleged

Contract (*continued*).

interest in the building under an execution against him, and the purchaser at the execution sale brought a suit in equity against the two daughters under R. L. c. 159, § 3, cl. 4, alleging that he and the defendants were joint owners of personal property, and seeking to have their respective rights determined and the building sold and the proceeds distributed. *Held*, that, assuming without deciding, that the owner of a chattel can create a life interest in it in favor of another with a reversion in himself, and that this can be done orally, and also that, the estate being free from debt, the administratrix with the consent of her co-legatee could create such an interest in the building, and that a gift or transfer of the income or use for life accompanied by possession of the building would constitute such an interest, yet the arrangement between the father and his daughters did not transfer to the father any interest in the building but on the part of the executrix and her co-legatee was merely an executory contract; so that nothing passed to the plaintiff by the seizure and the sale on execution. *Durfee v. Meadowcroft*, 267.

Revocable contract of agency.

11. By an instrument in writing, executed under seal by a lumber company and one B. named therein, the company appointed B. its "sales agent, for the sale of all the lumber that will or may be sawed from the timber now owned by the company on" a certain tract named, "the said B. agreeing on his part to sell all our lumber by the time it is in shipping condition at the market price." The instrument further provided that "the said B. shall receive a commission of five per cent for selling on the f. o. b. shipping point prices on all lumber sold by him and shipped by the company in compliance with the terms of this agreement, which appointment is made in accordance with the authority given the board of directors in article second of section third. . . . We, the company, to pay all necessary travelling expenses of the said B." The article of the by-laws referred to provided that "The board of directors shall have the power . . . to appoint and remove at pleasure all employees and agents of the corporation." The agent sued the company upon this instrument as a contract, alleging as a breach that the defendant "notified the plaintiff that it would not require his services as selling agent for said lumber" and refused "to allow him to carry out his part of said contract." On demurrer, it was *held*, that the declaration set forth no cause of action, the appointment of the plaintiff being revocable at the pleasure of the directors of the defendant, and the agreement contained in the instrument relating only to the nature of the plaintiff's agency and the compensation to be paid him while the agency was in force. *Bradlee v. Southern Coast Lumber Co.* 878.

Agreement to convey land with buildings.

- Construction of contract for conveyance of land with buildings thereon for entire price where value of buildings constitutes large part of total value of estate and before time for conveyance buildings are destroyed, *see post*, 16, 17.

Agreement reviving debt discharged in bankruptcy.

Construction of written promises of debtor made after his bankruptcy to pay debt barred by his discharge in bankruptcy as to whether they satisfy provisions of statute of frauds, see *post*, 15; FRAUDS, STATUTE OF, 7-9.

*Implied: Common Counts.*

12. If one conveys land to another under an oral agreement which the other refuses to perform and cannot be compelled to perform on account of his setting up the statute of frauds, he who conveyed the land can recover its value from the grantee on the ground that the consideration for the conveyance has failed and he is entitled to be reimbursed. *Cromwell v. Norton*, 291.

13. In an action to recover an instalment of the purchase price and sums of money expended for improvements upon land which the defendant agreed to convey to the plaintiff under an oral contract, which afterwards the defendant repudiated and refused to perform, the plaintiff in order to recover must show that he was ready and willing and offered to perform his part of the contract. *Cave v. Osborne*, 482.

14. In an action to recover compensation for hauling wood from a woodlot of the defendant, it was found by a judge, sitting without a jury, that the agreement was that the plaintiff should haul all the wood at the price of one dollar a cord, the defendant to cut it and have it ready for him, that the agreement made no provision for deferment of payment until all the wood was hauled, that the plaintiff performed his part of the contract as far as he could, and that there was a breach of the contract on the part of the defendant. It appeared that the plaintiff hauled all the wood that the defendant had cut and ready at a certain time, and was paid for it, that, there being no more wood ready at that time, he went to another job, and afterwards returned and hauled more wood for the defendant, for which the defendant refused to pay him until all the wood on the lot had been hauled away. *Held*, that, even if the contract was an entire one to haul all the wood upon the lot, the defendant by his breach of the contract having prevented full performance on the part of the plaintiff, the plaintiff was entitled to recover on a *quantum meruit* the fair value of the work done by him. *Bailey v. Marden*, 277.

Action to recover money paid by plaintiff on judgment in action against him as surety on defendant's bond given to dissolve attachment in another action can be maintained although between bringing of action on bond and recovery of judgment defendant was adjudicated bankrupt, see BANKRUPTCY, 1.

In action on *quantum meruit* by architect for services rendered in making preliminary plans for building, where defence is that plans were furnished in competition with understanding that plaintiff should not have compensation unless his plans were accepted, evidence of plans submitted by other architects in competition and of correspondence with them is not admissible, it not being shown that such matters were known to plaintiff, see EVIDENCE, 23; but plaintiff's opinion of value of services is admissible, *ibid.* 13.

*Termination.*

Contract for employment of agent personal and terminated at death of person employed, see *ante*, 6.

*Performance and Breach.*

15. The plaintiff in an action of contract upon a new promise of the defendant to pay by instalments a debt barred by the defendant's discharge in bankruptcy, if he proves such a promise in writing signed by the defendant sufficient to satisfy the requirement of R. L. c. 74, § 3, can recover only the instalments of the debt which in accordance with the new promise of the defendant were payable at the date of the writ. *Nathan v. Leland*, 576.
16. In this Commonwealth, where there is a contract for the conveyance of land with the buildings thereon for an entire price and the value of the buildings constitutes a large part of the total value of the estate and an important part of the subject matter of the contract, and before the time fixed by the contract for the conveyance the buildings are destroyed by fire without the fault of either party, the contract no longer is binding, because a substantial part of its subject matter has ceased to exist. *Hawkes v. Kehoe*, 419.
17. Where one agrees to convey a certain parcel of land "and the buildings thereon" on a certain day in exchange for a conveyance of other real estate, and the buildings are almost of equal value with the land, and the contract provides that the premises at the time of delivering the deeds are to be "in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted," and before the day named for the exchange of the deeds the buildings are destroyed by fire without the fault of either party, the failure to convey the land with the buildings thereon is not a breach of the contract, because in making it the parties contemplated the continued existence of the buildings as the foundation of the agreement and provided only against a change in their condition while existing. *Ibid*.
18. If the owner of lands in a distant State, the title to some of which is incumbered, enters into a contract under seal with a citizen of that State to pay him for his services in clearing the title to the lands and disposing of them, which expressly provides that in case of the death of the landowner before the contract is completed the executor of his will shall be required to carry it out, and the landowner upon executing the instrument further agrees by letter to execute a codicil to his will directing his executor to carry out the provisions of the contract or to have his executor follow his instructions to that effect, and if, before the services of the person employed under the contract are completed, the landowner dies without making such a codicil and the executor of his will and the beneficiaries thereunder refuse to permit the completion of the contract and assert a right to have the estate of the testator administered as if the contract had not been made, these acts constitute a breach of the contract for which the executor is liable in an action for damages. *Mills v. Smith*, 11.

19. In an action against an executor for damages for breach of a contract in writing, it appeared that by the contract sued upon the plaintiff agreed to take charge of the real estate belonging to the defendant's testator in a distant State in regard to some of which litigation was pending and to clear the title to the real estate, and the defendant's testator authorized the plaintiff to sell the real estate and after paying expenses to divide the net proceeds equally between the plaintiff and the defendant's testator, that the title to a part of the real estate had been held in the name of a brother in law of the defendant's testator, who having become involved in financial difficulties reconveyed it to the defendant's testator, that a judgment for over \$13,000 had been obtained against the brother in law by one of his creditors, and a suit in equity had been brought upon this judgment to set aside the reconveyance, that the plaintiff was the administrator of the estate of the brother in law, that the plaintiff acting under the contract made a settlement of the suit by which he secured a release of the claim upon the real estate and an assignment of the judgment to the defendant's testator, that to obtain this he conveyed to the holder of the judgment lands of the defendant's testator worth about \$5,000, that the judgment turned out to be worth over \$12,000 as a claim against the insolvent estate of the brother in law, and that the defendant as executor collected that amount from the insolvent estate. The defendant contended that the amount of this judgment could not be included as a part of the property of his testator in the distant State in computing the damages which the plaintiff was entitled to recover. It appeared that the plaintiff in the transaction acted in good faith under the contract in the interest of the defendant's testator in perfecting his title to the lands. *Held*, that the judgment was a part of the proceeds of the lands of the defendant's testator within the meaning of the contract; that, even if there was constructive fraud on the part of the plaintiff as administrator of the estate of the brother in law in procuring the assignment of the judgment in which he had a pecuniary interest, this was *res inter alios* as to the defendant, who moreover had ratified the transaction by collecting the money on the judgment. *Mills v. Smith*, 11.
20. The owners of land in a city, on which it was proposed to lay out a street, signed an instrument in writing under seal stating that in consideration of the immediate laying out and construction of the proposed street, and of the delaying of the assessment of betterments until the amount of the damages caused to the signers by the taking of their land and the cost of the construction should be determined, the owners of the land agreed that the payment of damages should be delayed until the balance due from each of them after offsetting the betterments had been determined, and further agreed to accept in payment for their land to be taken for the street certain prices per square foot there stated. The instrument was not signed by any one in behalf of the city. The city began the construction of the street but did not complete it within a reasonable time, and it was decided by this court in a previous case that the city having failed to complete the street had not complied with the terms of the offer of the landowners, which therefore never became binding on its signers, who



accordingly could recover their damages without waiting for the assessment of betterments. The city was ordered by a writ of mandamus to finish the construction of the street before a certain day. More than six years after the work of construction of the street was begun, and before any assessment of betterments had been made, some of the landowners who had signed the instrument, brought actions for their damages, to which the city pleaded the statute of limitations. The plaintiffs contended that their causes of action arose within six years, namely, when after the expiration of a reasonable time the city had failed to complete the street, and that by such failure the plaintiffs were released from their promises, under seal, which they contended had been binding up to that time, not to sue for their damages until the betterments had been assessed. *Held*, that the plaintiffs' causes of action for damages accrued when the construction of the street was begun; that, if, waiving the city's delay in the work of construction, they elected to avail themselves of the instrument signed by them as being a binding contract, they must abide by all the terms of such contract and could not sue for damages until the betterments were assessed; that if, on the other hand, they sought to set aside the instrument, because the city had failed to do that which would make it a binding contract, they must treat it wholly as a nullity, and their actions in that case were barred by the statute of limitations. *Averill v. Boston*, 488.

21. In an action of contract against a lumber company on an agreement in writing under which the plaintiff was appointed the selling agent of the defendant for a certain territory and afterwards was notified by the defendant that his services as selling agent no longer would be required, the declaration alleged "that before said denial of the existence of said contract and said notification by the defendant to the plaintiff that it would not require his services as said selling agent the plaintiff relying upon said contract consumed much time and went to great expense in arranging and negotiating with purchasers for the sale to them of said lumber when the same would be in shipping condition, and had rendered a great amount of service to the defendant for the purpose of carrying out said contract and had expended large sums of money in placing the defendant in a position to operate and saw said timber into lumber in order that the same would be in shipping condition." On demurrer, it was *held*, that the foregoing portion of the declaration contained no allegation that the plaintiff set on foot any negotiations which resulted in sales or that he incurred any expenses in negotiations so resulting. *Bradlee v. Southern Coast Lumber Co.* 378.

In order to establish right to recovery of instalment of purchase price of and payments for improvements on real estate agreed by defendant to be conveyed to plaintiff, plaintiff must show that he was ready and willing and offered to perform his part of contract, see *ante*, 13.

In action on contract to haul all wood from defendant's woodlot, containing no provision for payment till all wood was hauled, broken by owner of woodlot not paying for hauling of all wood cut at certain time, plaintiff can recover on *quantum meruit* without completing contract, see *ante*, 14.

## CONVERSION.

Unexplained transfer by executor to himself of shares of stock belonging to testator is in itself wrongful conversion, see **EXECUTOR AND ADMINISTRATOR**, 8.

## CO-OPERATIVE SOCIETY.

In an action by the trustee in bankruptcy of a co-operative trading corporation to recover money paid to the defendant by the manager of the corporation after it became insolvent, it appeared that the payment was of the sum of \$500 and was made by the manager to the defendant for "shares withdrawn." It was shown that the manager had no right to make the payment without authority from the board of directors, even if the company had been solvent. There was evidence that the stockholders had voted to add an amendment to the by-laws "that no person be allowed to hold more than \$400 in stock of the society," and there also was evidence that from that time to the date of the adjudication of the bankruptcy of the society "various shareholders held shares in excess of \$400 with the knowledge and consent of the society." *Held*, that the vote did not enlarge the defendant's rights in regard to the withdrawal of his shares, nor make him a creditor for the amount invested above the sum of \$400. *Richardson v. Devine*, 836.

## CORPORATION.

*Proof of Existence.*

In action against two defendants alleged to be partners doing business under firm name for injury caused by negligence of driver in employ of concern using that name, where defendants contended that they were stockholders in corporation using firm name and not partners, question of connection of defendants with business in which driver was employed was held to be for jury, see **AGENCY**, 1.

*Corporate Powers.*

1. In a suit in equity the following facts appeared: The Onset Bay Grove Association was created by St. 1877, c. 98, "for the purpose of holding personal property and real estate, where a wharf, hotel and other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages, under such rules and regulations as the association may prescribe." The charter further provided that "all buildings, booths or other structures erected on or attached to the grounds of the association shall for the purposes of taxation be considered real estate and taxable in the town of Wareham." The incorporators were spiritualists and established a spiritualists' resort. Camp meetings are a usual incident of such a resort and necessary for its establishment, and camp meetings were carried on by this corporation in buildings constructed for the purpose. *Held*, that these facts warranted a ruling that the charter impliedly authorized the corporation to use its property as a summer resort

Corporation (*continued*).

and to make it an attractive summer resort for spiritualists by providing a camp meeting there; and that it was right for a master to rule that on the facts found by him as above described "it was within the corporate powers of the association to expend money to carry on camp meetings." *Nye v. Whittemore*, 208.

Power of Old Colony Street Railway Company under St. 1901, c. 214, § 3, to maintain poles and wires for transmission of electricity for its corporate purposes in streets through which it is not authorized to operate its railway, see OLD COLONY STREET RAILWAY COMPANY.

#### *Ultra Vires.*

Charter of Onset Bay Grove Association, corporation created by St. 1877, c. 98, held to give corporation power to use property as summer resort and provide for camp meeting of spiritualists, see *ante*, 1.

#### *Officers and Agents.*

Case involving question of power of manager of co-operative society to pay out sums of money on withdrawal of shares without vote of directors, see EVIDENCE, 26; CO-OPERATIVE SOCIETY.

#### *Statutory Liability of Officers.*

Suit in equity under R. L. c. 110, § 58, cl. 5, to enforce liability of officers of corporation for its debts by reason of false certificate as to payment for its capital stock, see EQUITY JURISDICTION, 8-11.

#### *Payment for Capital Stock.*

2. In this Commonwealth, when, before the repeal of R. L. c. 110, § 44, a payment of the capital stock of a corporation could not be made by the conveyance of property except in conformity with the terms of that section, if the corporation agreed to buy property from a subscriber for its stock at a value equal to the amount of his subscription, and the subscriber borrowed this amount of money from a bank and paid it to the corporation for the shares for which he had subscribed, and the corporation gave him its check in payment for the property it had agreed to buy from him and he conveyed the property to the corporation and repaid the money he had borrowed from the bank with the check of the corporation, this transaction, even if both parties acted in good faith and the property was worth the full amount paid for it, was not a payment in cash for the capital stock of the corporation within the meaning of the statute. *Harvey-Watts Co. v. Worcester Umbrella Co.* 138.

#### *Taxation.*

Of corporate property.

Taxation of water mains and pipes of foreign corporation in way not shown to be public in town of Salisbury held to be illegal, see TAX, 8-10.

Provisions of R. L. c. 12, §§ 16, 18, in regard to separate taxation of interests of mortgagor and mortgagee in real estate do not apply to mortgage by

foreign corporation which covers corporation's real estate both in this Commonwealth and elsewhere, and its franchises, trademarks, patents and equipment, see **TAX**, 3.

Of stockholders.

Neither St. 1903, c. 423, § 1, nor R. L. c. 12, § 26, has effect of making shares of stock in corporation, purchased by broker for customer and held by broker under pledge from customer, although certificates are indorsed in blank by former owner, taxable to broker, see **TAX**, 5-7.

### COVENANT.

Covenant by lessee, in lease of land without restriction of assignment, to make improvements on land during term and leave them there at end of term if lessee does not purchase premises, runs with land and binds assignee of lease, and he cannot remove improvements on leaving land nor can his creditors attach them, see **LANDLORD AND TENANT**, 2.

Commonwealth held liable to repay tax on land to lessee of part of Commonwealth Flats for business purposes under lease made before St. 1904, c. 385, whereby lessee covenanted to pay taxes on improvements placed on land by lessee which parties agreed to consider as personal property and Commonwealth covenanted for lessee's quiet enjoyment, see **LANDLORD AND TENANT**, 1.

### CUSTOM.

Custom as to entry of judgment in district court, see **PRACTICE**, CIVIL, 48.

Evidence of custom of passengers to travel in baggage part of combination car on railroad train and have their tickets punched while there by conductor is inadmissible in action by passenger so travelling to recover from company for injuries received in collision, see **EVIDENCE**, 24.

Custom in regard to use of waters of river by different riparian owners, proprietors of respective mill privileges, which has existed for more than twenty years but never has been adverse does not affect rights of proprietors to use of waters as against each other, see **WATER RIGHTS**, 1-4.

### CY PRES.

Fund held in trust, income of which is to be devoted to religious uses in connection with particular church, is public charity, and, on proper case being made out, court may direct its application *cy pres*, see **CHARITY**, 2, 3.

### DAMAGES.

#### *Interest.*

Where interest is allowed on money due, computation is of simple interest unless there is express requirement otherwise, see **INTEREST**. Application of this principle to construction of St. 1887, c. 157, § 6, giving town of Tisbury right to take franchise and all corporate property of Vineyard Haven Water Company, see **VINEYARD HAVEN WATER COMPANY**.

*On Petition for Writ of Mandamus.*

What damages can be awarded on petition for writ of mandamus to compel reinstatement of veteran wrongfully ousted from employment under civil service law, see **VETERAN**, 8.

*In Suit in Equity to restrain Obstruction of Easement.*

In suit in equity for mandatory injunction restraining permanent obstruction of easement of right of way, where it appeared that mandatory injunction should be denied because it would be inequitable in view of hardship to defendant and offer of defendant to give to plaintiff another right of way equally advantageous, court retained jurisdiction for assessment of damages, which were to be entire if offer of defendant was refused, and to extend to date of giving of new right of way if offer was accepted, see **EQUITY JURISDICTION**, 4, 12.

*For Property taken or injured under Statutory Authority.*

Petition for damages under statute may not be amended in Superior Court by adding separate claim barred by limitation of statute, see **SUPERIOR COURT**, 1-3.

Construction of St. 1887, c. 157, § 6, with regard to amount to be paid by town of Tisbury to Vineyard Haven Water Company upon taking franchise and corporate property of company, see **VINEYARD HAVEN WATER COMPANY**.

Petitioner relying on provision of statute giving damages on account of limitation of height of buildings is estopped to deny constitutionality of provision of same statute requiring reduction for benefits arising from such limitation, such different provisions not being separable, see **CONSTITUTIONAL LAW**, 18.

Construction of St. 1902, c. 486, which established South Deerfield Water Supply District, with regard to what waters, lands and easements water supply company was authorized to take and for what it should pay damages, see **SOUTH DEERFIELD WATER SUPPLY COMPANY**.

**DEED.**

*Consideration.*

Where one conveys land to another under oral agreement which grantee refuses to perform and grantee sets up statute of frauds, grantor can recover value of land on ground of failure of consideration, see **CONTRACT**, 12.

In action by one, who alleges that he conveyed land to defendant under oral trust which defendant refuses to perform, for value of land, where defendant alleges that there was valid consideration for conveyance and no trust, evidence of amicable relations of plaintiff and defendant up to time of plaintiff's demand of reconveyance is not admissible to show consideration for deed, see **EVIDENCE**, 25.

*Delivery.*

If the owner of land executes an absolute deed of it without consideration in order that the grantee may execute a mortgage of the land to secure money lent to the grantor, and has the deed recorded but retains possession of it, and the grantee at the request of the grantor executes the desired mortgage, the making of the mortgage constitutes an acceptance of the deed and the title passes to the grantee without any manual delivery of the instrument. *Creeden v. Mahoney*, 402.

*Construction.*

Construction of deed of land recited to be in consideration of one dollar and other valuable considerations paid by certain persons as trustees of unincorporated religious society to such "trustees, their heirs and assigns forever," *habendum* to grantees, "trustees and their heirs and assigns, to their own use and behoof forever," consideration having been paid by members of unincorporated society, with regard to what trust was created, and rights of certain incorporated religious society claiming right to control property, see RELIGIOUS SOCIETY, 1-3.

## DEVISE AND LEGACY: CONSTRUCTION.

*Per Stirpes or per Capita.*

1. A testator devised and bequeathed the residue of his estate "to the persons who at my decease are my heirs at law, such heirs at law to share the same equally." He left as his heirs at law a surviving sister, two nieces, who were the daughters of a deceased sister of the testator, and a grandnephew, who was the son of a deceased daughter of his deceased sister. The same persons would have been his heirs at law had he died at the date of his will. *Held*, that the distribution must be *per stirpes*, the testator's surviving sister receiving one half of the residue and each of the other three heirs receiving one sixth, the direction to share equally being given effect by applying it to the division between the classes of the testator's heirs. *Allen v. Boardman*, 234.

*Meaning of Particular Words.*

2. On a bill by an executor for instructions the following facts appeared: The plaintiff's testator in the seventh clause of his will made this bequest: "I give and bequeath all the glue (but not the glue stock) which I may leave on hand at my decease" to a trustee for the benefit of certain beneficiaries. To a brother not included in these beneficiaries he made the following bequest: "I give and bequeath to my said brother all the tools, fixtures and machinery in my glue factory, and all my personal property of whatever kind or description that at the time of my death shall be in or on the premises described in section second of this will [which described the glue factory], excepting the glue, which I have hereinbefore disposed of in section seven of this will." It appeared that at the time of his death, the testator had on hand in his glue factory a large quantity of glue and also a large quantity of gelatine, worth a little more than the glue. He

also had in the hands of a selling agent in another city another quantity of gelatine. Glue and gelatine are made from the same stock and by the same process of manufacture, there being no difference between gelatine and common glue except that gelatine is a higher grade of the same substance. There was evidence that, although gelatine and glue are sold in the market under different names, from the point of view of manufacturers they are both in a broad general sense glue, and that the manufacture of gelatine as a distinct product for a use different from that of common glue had begun in the testator's factory and other similar factories not very long before the will was made. There was no mention in the will of gelatine as distinguished from glue. *Held*, that the word "glue" included gelatine and that the words "on hand" included the goods sent away to be sold by the selling agent as well as those at the factory, so that both quantities of gelatine passed to the trustee. *Brown v. Clothey*, 271.

#### DISCRETION OF COURT.

See cross references under this subtitle of PRACTICE, CIVIL, page 725.

#### DISTRICT COURT OF CENTRAL BERKSHIRE.

Construction of St. 1869, c. 416, § 5, with regard to District Court of Central Berkshire, and application to facts as to entry of judgment therein without specific order or any standing or general order of court, see PRACTICE, CIVIL, 48.

#### DIVORCE.

See MARRIAGE AND DIVORCE.

#### EASEMENT.

Jurisdiction and power of court in suit in equity asking for mandatory injunction restraining permanent obstruction of right of way and for damages, where granting of injunction would be inequitable in view of offer of defendant to provide plaintiff with equally advantageous right of way and of hardship to defendant in compelling restoration of former condition of things, see EQUITY JURISDICTION, 3, 4, 12.

Right of owner of building having right to maintain openings into and upon adjoining passageway for light and air and to ventilate into it, to enjoin operation of electric fan by defendant in such way as to send heated, impure and ill smelling air into window of plaintiff's building, see NUISANCE, 1.

#### ELECTION.

Plaintiff held unable to maintain action of contract because, if he elected to be bound by certain agreement in writing, action was prematurely brought, and, if he repudiated agreement, he was barred by statute of limitations, see CONTRACT, 20.

Although veteran employed by city under R. L. c. 19, §§ 23, 24, and rules of civil service commissioners and wrongfully discharged while there was work to be done of sort for which he was employed has brought action to

recover wages due since discharge, he can maintain petition for writ of mandamus to compel reinstatement, see **VETERAN**, 8.

### ELECTRICITY.

Liability of street railway company for injury to passenger caused by electricity, see **NEGLIGENCE**, 31, 32.

Liability of telephone company for injury to employee caused by electricity, see **NEGLIGENCE**, 8, 18, 19.

Power of Old Colony Street Railway Company to maintain poles and wires for transmission of electricity in streets through which it is not authorized to operate its railway, see **OLD COLONY STREET RAILWAY COMPANY**.

### ELEVATED RAILWAY.

Duty of street railway company as to passenger entering car in subway, see **NEGLIGENCE**, 27-29; **CARRIER**, 2.

### EQUITY JURISDICTION.

#### *Estoppel.*

If owner of land without consideration executes absolute warranty deed in order that grantee may execute mortgage of it to secure money lent grantor and has deed recorded but retains possession of deed, and grantee executes mortgage as requested, grantor is estopped by covenants in deed from maintaining suit in equity against grantee for cancellation of deed subject to mortgage, see **DEED**; *post*, 7.

#### *Injunction on Bill of Several Plaintiffs sworn to by but One.*

Under provisions of Equity Rule 2 of Superior Court injunction may issue on bill in equity by several plaintiffs where but one makes affidavit as to truth of allegations therein, see **EQUITY PLEADING AND PRACTICE**, 3.

#### *Mandatory Injunction.*

Jurisdiction and power of court in suit in equity asking for mandatory injunction restraining permanent obstruction of right of way and for damages, where granting of injunction would be inequitable in view of offer of defendant to provide plaintiff with equally advantageous right of way and of hardship to defendant in compelling restoration of former condition of things, see *post*, 3, 4, 12.

#### *Accounting.*

1. Where the owners of improved real estate appoint an agent to manage the property under an irrevocable power for a term of years, accounting to them for the rents after retaining in his discretion such sums as may be required for the disbursements enumerated in the instrument of appointment, a fiduciary relation is created which entitles the owners of the real estate to an accounting in equity. *Campbell v. Cook*, 251.



*To enforce Negative Contract.*

Bill in equity to enforce contract not to engage in specified business for certain period in designated territory made on sale of business and good will by manufacturer to competitor sustained under circumstances, see CONTRACT, 7, 8.

*Discovery.*

2. In a suit in equity by the owners of improved real estate against an agent appointed by them to manage the property under an irrevocable power for a term of years, accounting to them for the rents after retaining in his discretion such sums as might be required for the disbursements enumerated in the instrument of appointment, for an accounting, and seeking discovery as to the amount of insurance procured and placed by the defendant on each parcel of real estate, giving the rates paid and the names of the companies which issued the policies, the judge found that the insurance companies were solvent and declined to order the defendant to disclose their names or to give further information concerning the insurance. *Held*, that the plaintiffs were entitled to a full discovery to ascertain whether the disbursements charged by the defendant actually had been made, including the names of the companies and the premiums paid for insurance to companies of which the defendant was the local agent in which it appeared that so far as possible he had placed the insurance. *Held, also*, that the judge's finding of financial soundness did not involve a finding that the defendant was not obliged to account further by stating the names of the companies, and that the refusal to order a disclosure of the names was a ruling of law, which on appeal could be reversed. *Campbell v. Cook*, 251.

*To restrain Obstruction of Easement.*

3. The issuing of a mandatory injunction to restrain the permanent obstruction of an easement is within the discretion of the court, which has to determine upon the circumstances of each case whether the enforcement of this remedy is equitable. *Levi v. Worcester Consolidated Street Railway*, 116.
4. In a suit in equity against a street railway company which in the construction of its railway had made a deep cut through the land of a private person over which the plaintiff had a right of way, which wholly deprived the plaintiff of the use of the way, the plaintiff asked for a mandatory injunction requiring the defendant to refill the excavation it had made and to restore the way to the condition in which it was before the work of the defendant there was begun. It appeared that to restore things to their former condition would subject the defendant to great inconvenience and loss and would be inequitable and that the defendant offered to give or procure a conveyance to the plaintiff of a new right of way in substitution for the one destroyed. The judge who heard the case made a decree that the defendant should convey or cause to be conveyed to the plaintiff such a substituted right of way. *Held*, that the decree sufficiently provided for the wants of the plaintiff as to the right of way, but that the plaintiff also was entitled to damages for the past acts of

the defendant, and that the bill might be retained for the assessment of such damages. The plaintiff however was given the right to file within a time named a rejection of the new right of way offered as a substitute and to ask for full damages for the permanent loss of the right of way without such substitution, in which case it was ordered either that the bill might be retained to assess such damages or might be dismissed without prejudice to the right of the plaintiff to recover damages in an action at law, as the plaintiff might elect. *Levi v. Worcester Consolidated Street Railway*, 116.

Right of plaintiff in equity, owner of building having right to maintain openings into and upon adjoining passageway for light and air and to ventilate into it, to enjoin operation of electric fan by defendant in such way as to send heated, impure and ill smelling air into window of plaintiff's building, see NUISANCE, 1.

*To reach and apply Equitable Assets.*

5. In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply in payment of a debt due to the plaintiff equitable assets of the defendant debtor within this Commonwealth, it appeared that a Massachusetts corporation had issued a policy of insurance on the life of the defendant debtor in the sum of \$10,000 for a term of thirty-two years, promising to pay that sum to him or his assigns at the end of that period or in the event of his death before that time to pay it to his wife, that this policy had a cash surrender value of more than \$3,000 and was in the possession of the defendant insurance company to which it had been delivered by the defendant debtor as security for an advance to him of about \$1,200. *Held*, that the interest of the defendant debtor in the policy contingent on his survival of his wife was an equitable asset whose value could be ascertained by sale or by some other means within the ordinary procedure of the court and which therefore could be reached and applied under the statute. *Biggert v. Straub*, 77.

*To remove Cloud from Title.*

6. The jurisdiction over suits in equity to remove a cloud from the title to land, mentioned in R. L. c. 182, §§ 6-10, was not transferred by St. 1904, c. 448, § 1, from the Superior Court to the Land Court, and such suits remain within the general equity jurisdiction of the Superior Court and the Supreme Judicial Court. *First Congregational Society in East Longmeadow v. Metcalf*, 288.
7. If the owner of land conveys it by an absolute deed to his brother in law without consideration, in order that the grantee may execute a mortgage of the land to secure money lent to the grantor, and has the deed recorded, and the grantee at the request of the grantor executes the desired mortgage, and afterwards refuses to reconvey the land to the grantor, the grantor cannot maintain a suit in equity against the grantee to have the deed cancelled as a cloud upon the plaintiff's title and to have it declared void except as against the mortgagee and those claiming under him. *Creeden v. Mahoney*, 402.

*To enjoin Nuisance.*

Owner of building injured by acts of adjoining owner in maintaining electric fan on his premises in such way as to send current of heated, impure and ill smelling air across a passageway and into plaintiff's window may maintain bill in equity to enjoin nuisance, see **NUISANCE**, 1.

*To restrain Removal of Improvements from Leased Premises.*

Lessor of land, under lease containing no restriction as to assignment but containing covenant by lessee that, in case he did not purchase property he would make certain improvements and leave them on land at end of term, can maintain bill in equity to restrain purchaser of improvements at sale on execution against assignee of lease from removing improvements, see **LANDLORD AND TENANT**, 2.

*Trust.*

Fiduciary relation which entitles owners of real estate to accounting in equity held to arise from appointing by them of agent to manage property under irrevocable power for term of years according to specified conditions, see *ante*, 1, 2.

If owner without consideration executes absolute deed of land in order that grantee may execute mortgage of it to secure money lent grantor and has deed recorded but retains possession of it, and grantee executes mortgage as requested, making of mortgage constitutes acceptance of deed and no manual delivery is necessary; and bill in equity cannot be maintained against grantee by grantor to cancel deed subject to mortgage, see **DEED**; *ante*, 7.

*To enforce Statutory Liability of Officers of Corporation.*

8. In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of certain officers of the corporation for its debts on the ground that they had signed a certificate which was required by law knowing it to be false, if it appears that the defendants signed a certificate that certain shares issued by the corporation were paid for in cash, that the shares in fact were paid for by a conveyance of property to the corporation made in a manner which the defendants were advised by a member of the bar was in effect a payment in cash, and that they in good faith acted under his advice in receiving the payment as officers of the corporation and in signing the certificate, the plaintiffs have failed to show that the certificate was known to the defendants to be false and cannot recover against them. *Harvey-Watts Co. v. Worcester Umbrella Co.* 138.
9. In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of certain officers of the corporation for its debts on the ground that they had signed a certificate which was required by law knowing it to be false, where the defence is that the defendants in signing the certificate in question acted in good faith under

the advice of counsel, if it appears that the member of the bar who advised the defendants was a subscriber for two shares of the stock of the corporation which he had paid for in cash, this fact is immaterial and in no way tends to show that the member of the bar was incapacitated from giving the advice in question. *Harvey-Watts Co. v. Worcester Umbrella Co.* 138.

10. In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of the general manager, the treasurer and the president of the corporation for its debts on the ground that they had signed a false certificate that the capital stock of the corporation was paid in in cash and was invested in the purchase of material, supplies, machinery, stock and labor, knowing it to be false, it appeared that the defendants had signed a certificate to the effect alleged and that ten shares of the capital stock had been paid for not in cash but by a note which remained unpaid for two years, and that the certificate was signed while the note was held by the corporation still unpaid so that the statements contained in the certificate were false, that the loan was made and the note was received in payment for the ten shares by the defendant general manager and the defendant treasurer without the knowledge of the defendant president, that the president was a director, that the by-laws of the corporation provided that no loan should be made without action by the directors, and that no vote of the directors authorizing the loan was put in evidence. *Held*, that it could not be assumed in the absence of evidence to that effect that the directors passed a vote authorizing the loan or that the defendant president acted recklessly in signing the certificate as to the capital stock; therefore that there was no evidence that when he signed the certificate he knew it to be false and he was not shown to be liable under the statute. *Ibid*.
11. In a suit in equity under R. L. c. 110, § 58, cl. 5, by creditors of a corporation to enforce the alleged liability of the general manager and the treasurer of the corporation for its debts on the ground that they had signed a false certificate that the capital stock of the corporation was paid in in cash and was invested in the purchase of material, supplies, machinery, stock and labor, knowing it to be false, it appeared that the defendants had signed a certificate to the effect alleged, and that ten shares of the corporation stated in the certificate to have been paid for in cash were paid for in the following manner: The defendant general manager had induced a certain person to subscribe for the ten shares by agreeing that he or the defendant treasurer would arrange it so that the payment for the shares could be made by the subscriber giving a note to the company for the amount. In pursuance of this agreement the subscriber borrowed \$1,000 from a bank and gave it to the defendant general manager. On the next day the subscriber gave to the defendant general manager or the defendant treasurer his note for \$1,000 payable to the corporation and received from the corporation \$1,000, which he used in repaying the money borrowed by him from the bank. The subscriber's note was discounted by the corporation at the same bank to meet the check signed by the defendant treasurer which was used by the corporation in lending the

**Equity Jurisdiction (continued).**

subscriber the \$1,000. No certificate for the shares was issued to the subscriber until his note to the corporation had been paid in full two years after it was received. The certificate alleged to be false was signed by the defendants while the note of the subscriber was held by the corporation and was unpaid. *Held*, that the ten shares were not paid for in cash but by a note in violation of the provision of R. L. c. 110, § 44, and that the capital stock was not invested in material or the other things named in the certificate, as \$1,000 of it was lent to the subscriber for the ten shares, and that both the defendant general manager and the defendant treasurer had knowledge of these facts when they signed the certificate in regard to the capital stock and were liable for the debts of the corporation under the terms of the statute. *Harvey-Watts Co. v. Worcester Umbrella Co.* 138.

*For Assessment of Damages.*

12. In a suit in equity seeking for a mandatory injunction, if it appears that the acts of the defendant have destroyed or interfered with a property right of the plaintiff but that it would be inequitable to compel the defendant to restore the condition of things which existed before the acts were committed and an injunction is refused on that ground, the court may retain jurisdiction for the assessment of the damages suffered by the plaintiff. *Levi v. Worcester Consolidated Street Railway*, 116.

**EQUITY PLEADING AND PRACTICE.***Parties.*

Commonwealth cannot be made defendant in suit in equity under R. L. c. 25, § 10, by ten taxable inhabitants of city or town to restrain unlawful raising or expenditure of money or incurring of obligations, see **COMMONWEALTH**, 1, 2.

*Bill.*

1. The objection that a bill in equity is multifarious is waived by going to a hearing on the merits. *Vaughan v. Bridgham*, 392.
2. A petition in the nature of a bill in equity to recover from a city assessments for street watering paid under protest, even if it can be amended in such a way as to show that the remedy is a proper one, must be dismissed on demurrer if it contains no averments showing the assessments to have been illegal. *Hodgdon v. Haverhill*, 327.

*Affidavit to Bill.*

3. Under the provision of Equity Rule 2 of the Superior Court, that no injunction shall issue except upon a bill which has been sworn to or verified by affidavit, it is sufficient if the bill is sworn to by one of two plaintiffs. *First Baptist Society in Brookfield v. Dexter*, 187.

*Amendment.*

Amendment to petition in nature of bill in equity to recover assessments for street watering paid to city under protest although it shows remedy to be

proper one will not cure defect that petition has no averments that assessments are illegal, *see ante*, 2.

#### *Rules of Court.*

Under provisions of Equity Rule 2 injunction may issue on bill in equity by several plaintiffs where but one makes affidavit as to truth of allegations therein, *see ante*, 3.

It is too late after appeal from decree granting injunction to object for first time that bill in equity was not properly sworn to according to Equity Rule 2, *see post*, 10.

Under Equity Rules 21 and 31, exceptions to master's report may by special order of court be filed more than year and half after report was filed, *see post*, 5.

#### *Agreement of Counsel.*

Agreement of counsel, made on appeal to this court from decree of single justice, that copy of certain will printed in Massachusetts Reports in report of another case between same parties may be referred to, has no effect on record before this court, which includes only those matters that were before single justice when he made decree, *see post*, 13.

#### *Exceptions to Master's Report.*

4. On an appeal from a decree in a suit in equity confirming a master's report it is not open to the appealing party to contend that the master erred in excluding certain evidence offered by him if he took no exception to the report based on the exclusion of the evidence by the master. *Lee v. Methodist Episcopal Church*, 47.

5. Under Superior Court Equity Rules 21 and 31, a party to a suit in equity by a special order of court may be allowed to file exceptions to a master's report more than a year and a half after the report was filed. *Nye v. Whittemore*, 208.

#### *Memorandum of Findings.*

6. In a suit in equity a memorandum of findings made by the judge who heard the case, consisting of a brief extract of material evidence and a statement of his findings of fact, which was made by the judge voluntarily without the request of either party, is a part of the record and has the same effect as a report made under R. L. c. 159, § 23. *Lindsey v. Bird*, 200.

#### *Waiver.*

Objection that bill in equity is multifarious is waived by going to hearing on merits, *see ante*, 1.

#### *Record.*

Memorandum of findings in suit in equity by judge who heard case made voluntarily and without request of either party is part of record and of same effect as report made under R. L. c. 159, § 23, *see ante*, 6.

*Decree.*

7. A decree in a suit in equity of "Bill dismissed" is a final decree upon the merits. *Corbett v. Craven*, 80.
8. Between the parties to a suit in equity or an action at law or their privies a final decree or judgment on the merits includes and disposes of everything that was litigated or might have been litigated in the case brought by the plaintiff before the court. *Ibid.*
9. A decree of "Bill dismissed" in a suit in equity by the trustee of the estate of a bankrupt, to set aside certain bills of sale and to obtain possession of personal property in the hands of the defendant received by him from the bankrupt, is a bar to an action of tort against the same defendant, by one who while the suit in equity was pending purchased from the trustee certain personal property of the bankrupt not covered by the bills of sale, for the alleged conversion of this property, if the property alleged to have been converted was included in the property claimed by the trustee as plaintiff in the suit in equity, although the parties in that suit may have omitted to distinguish it from the property described in the bills of sale. *Ibid.*

Decree after hearing on bill in equity which sets forth sufficient ground for relief on findings which support allegations of bill will not be disturbed on appeal, where evidence is not reported, see *post*, 11.

Decree in suit in equity made by judge who heard case on oral evidence somewhat conflicting which would warrant finding for either party will not be reversed on appeal, especially where documentary evidence before trial judge was not before this court on appeal, see *post*, 12.

In suit in equity seeking mandatory injunction restraining permanent obstruction of right of way injunction was denied but jurisdiction was retained for assessment of damages which were to be entire in case offer of defendant to provide for plaintiff equally advantageous right of way was refused, and to extend to date of giving of such way in case offer was accepted, see EQUITY JURISDICTION, 3, 4, 12.

*Appeal.*

10. On an appeal in a suit in equity from a decree granting an injunction it is too late to raise for the first time the point that the injunction should not issue because the bill was not sworn to as required by the provision of Equity Rule 2 of the Superior Court. *First Baptist Society in Brookfield v. Dexter*, 187.
11. Where a bill in equity sets out a sufficient ground for relief and the findings of the judge who heard the case support the allegations of the bill, on an appeal from a decree for the plaintiff without any report of the evidence the findings of the judge are conclusive. *Ibid.*
12. In a suit in equity coming to this court by appeal, a decree, made by a judge who heard the case on oral evidence somewhat conflicting which would warrant a finding in behalf of either party, will not be reversed unless plainly wrong, especially where certain letters and other documents

- which were in evidence at the hearing are not before this court. *Lindsey v. Bird*, 200.
13. On an appeal to this court from the decree of a single justice an agreement of counsel, that the copy of a certain will printed in the Massachusetts Reports in the report of another case between the same parties may be referred to, has no effect upon the record before this court, which includes only those matters that were before the single justice when he made the decree. *Holland v. Ball*, 80.
14. The rule that the decision of a single judge sitting in equity will not be reversed on appeal unless clearly erroneous is confined to cases where the evidence is given orally and there is a conflict in the testimony. Where the evidence is documentary the full court on appeal receives the case in regard to questions of fact and inferences of fact to be drawn from the evidence in the same way that the single judge received it. *Harvey-Watts Co. v. Worcester Umbrella Co.* 138.
15. Where the evidence in a suit in equity coming by appeal to this court consisted of an agreement in writing of counsel as to certain facts, the articles of incorporation and the by-laws of one of the defendants, interrogatories to two other defendants and their answers thereto, certain checks and other documents, and the oral testimony of one witness, it was held, that the questions of fact except so far as covered by the testimony of the one witness were presented to this court as fresh questions unaffected by the decree from which the appeal was taken. *Ibid.*
- Memorandum of findings in suit in equity by judge who heard case, made voluntarily and without request of either party, is part of record on appeal, see *ante*, 6.
- It is not open to party appealing from decree confirming master's report to contend that master erred in excluding certain evidence unless he took exception to report based on that contention, see *ante*, 4.
- Where plaintiff has right to discovery of details of management and to accounting by agent under irrevocable power for term of years, finding by judge that certain companies with whom agent had insured plaintiff's property were solvent and sound does not preclude plaintiff from enforcing right to discovery of names of companies, see EQUITY JURISDICTION, 2.
- Appeal from finding of justice who heard suit in equity, that there was no mistake or fraud in making of sale of business and good will by manufacturer to competitor and of covenant not to carry on same business in designated territory for certain period, dismissed, see CONTRACT, 8.

### ESTOPPEL.

- As defence to bill in equity, see DEED; EQUITY JURISDICTION, 7.
- Consent of defendant to default entered in police, district or municipal court against him does not estop him from appealing to Superior Court from judgment following default, see PRACTICE, CIVIL, 27.
- One ordering goods on printed blank stating that sale was made on representations therein and on no others and that agent making sale had no authority to make other representations cannot after delivery of goods



*Estoppel (continued).*

repudiate sale on ground that sale was procured by false representations of seller's agent, see **CONTRACT**, 9.

Assignee of account is not bound by fact that payments were made by debtor to assignor after notice of assignment, it not being shown that assignee knew of or acquiesced in such payments, and, in action by assignee against debtor, he is not estopped to deny validity of such payments, see **ASSIGNMENT**.

Petitioner relying on provision of statute giving damages on account of limitation of height of buildings is estopped to deny constitutionality of another provision of same statute requiring deduction for benefits arising from such limitation, where petitioner has no standing in court except by terms of part of statute requiring such deduction, and such two provisions are not separable, see **CONSTITUTIONAL LAW**, 18.

Next of kin of intestate are not estopped to contend that application of funds of intestate before her death by her son, later her administrator, was illegal and that administrator should be charged with amount of such funds by fact that such application was made with consent and for benefit of administrator's brother, since deceased, father of next of kin through whom they claim, see **EXECUTOR AND ADMINISTRATOR**, 4.

Receipt without objection by devisees under will of proceeds of sale by executor of real estate of testator made when there was sufficient personal property to pay all charges and debts of estate and under erroneous belief that will gave him power to sell real estate, and assent to executor's accounts containing details of transaction, estop devisees from alleging such acts as breaches of executor's probate bond, see **EXECUTOR AND ADMINISTRATOR**, 9.

## EVIDENCE.

### *Judicial Notice.*

1. The courts take judicial notice of the statutes contained in the Revised Laws and a refusal to admit such statutes in evidence is not a ground of exception. *Squier v. Barnes*, 21.
2. It is a matter of common knowledge that in the proper operation of a passenger train on a steam railroad there may be jerks and lurches. *Foley v. Boston & Maine Railroad*, 332.
3. It is a matter of common knowledge that from time to time the tracks of steam railroads must be repaired and bridges must be replaced, and that in the performance of this work it may be necessary to use crossovers from one main track to another. *Ibid*.

### *Presumptions and Burden of Proof.*

4. The record of a district court imports verity and is presumed to be true until the contrary is shown. *Gardner v. Butler*, 96.
5. Where the case of a plaintiff or demandant depends on proving the breach of the condition of a mortgage by a failure to make payments of money as required by its terms, the burden is on the plaintiff to prove the breach by showing that the payments were not made. Expressions in some of the earlier cases disapproved. *Temple v. Phelps*, 297.

6. Where the case of a plaintiff or demandant depends on proving the breach of the condition of a mortgage of real estate by a failure to make payments of money as required by its terms, whether the production of the mortgage by the plaintiff or demandant is even *prima facie* evidence that the payments have not been made, *quaere*. *Temple v. Phelps*, 297.
  7. In the trial of a writ of entry where the demandant claims title as the purchaser of the land at a foreclosure sale, and the condition of the mortgage was that the tenant, who was the mortgagor, should pay \$70 to his mother in each year during her life, and the tenant relies on the defence that the foreclosure sale was void because there had been no breach of the condition of the mortgage, the burden is on the plaintiff to show that the required annual payments were not made. *Ibid*.
  8. There is no presumption that the laws of New York contain statutory provisions similar to those of R. L. c. 73, § 103, in regard to days of grace for negotiable instruments, and, in the absence of evidence on the subject, the law of New York will be presumed to be the same as the common law of this Commonwealth before the enactment of St. 1896, c. 496. *Demelman v. Brazier*, 588.
- Burden is on defendant in action on insurance policy to prove allegations in answer that policy is voidable because of material misrepresentations by insured in application, see **INSURANCE**, 7.
- In order for widow to maintain action under R. L. c. 106, § 73, against her husband's employer for causing his instantaneous death, plaintiff must show affirmatively that her husband, at time of accident, was in exercise of due care, see **NEGLIGENCE**, 24.
- In action by husband against father of his wife for alienation of her affection, burden is on plaintiff to show that acts of defendant were done because of malice toward plaintiff; in this case question held rightly submitted to jury, see **ALIENATION OF AFFECTION**, 1, 2.
- In action by woman passenger against street railway company, mere fact that plaintiff's dress caught on something as she was alighting from car and firmly held her after falling is not sufficient to warrant submission of case to jury, without its appearing on what dress caught or why it caught there, see **NEGLIGENCE**, 38.
- Where there is no evidence to contrary, good faith and correct judgment of school committee of town in closing certain school will be assumed on petition for writ of mandamus to compel them to re-open school, answer setting up facts to show good faith, see **SCHOOL AND SCHOOL COMMITTEE**, 2.
- In action against two defendants alleged to be partners doing business under a firm name for injury shown to have been caused by negligence of driver in employ of concern using alleged name, where defendants contended that they were stockholders in corporation using firm name and not partners, question of defendants' connection with business in which driver was employed was for jury, see **AGENCY**, 1.
- Creditor held not to have sustained burden of proving breach of poor debtor's recognizance in action thereon where records of court are consistent with assumption that judge was present for appointed hour during which

*Evidence (continued).*

debtor also was present, but where records do not show that creditor was present, see **POOR DEBTOR**.

*Admissions by Conduct.*

9. At the trial of an indictment under R. L. c. 212, § 16, as amended by St. 1905, c. 318, for knowingly distributing and circulating a card conveying notice of a place where directions and information might be obtained for the purpose of causing or procuring the miscarriage of women pregnant with child, where it appears that the card described in the indictment was given by the defendant to a police officer in disguise in response to an inquiry by him as to treatment for a proposed patient, evidence is admissible describing the rooms where the inquiry was made and the card was given, of the presence there of envelopes addressed to physicians containing similar cards, and of statements made by the defendant to a sergeant of police who entered while the interview was in progress, that the officer to whom she had given the card was a friend of hers, giving a name and address as his, and that she got acquainted with him at a social party two months previous. *Commonwealth v. Hartford*, 464.

*Book Entries.*

10. Entries made by a dealer in his books of account are not contracts but are private memoranda kept for his own use, and in an action for the price of goods sold and delivered he can show that goods charged on his books to another person were sold to the defendant. *Petty v. Benoit*, 233.
11. In an action for the price of goods sold and delivered, where the plaintiff has introduced in evidence his books of account, assumed to have been books of original entry, wherein the goods alleged to have been sold to the defendant are charged to him up to a certain date and after that date are charged to his son, the plaintiff may be allowed to introduce evidence of a conversation with the defendant's son, in which the son asked the plaintiff to make out the bills to him instead of to his father but said that his father would be responsible for them, and to show that the goods although charged to the son were delivered according to the course of business to the defendant or to his order; and this conversation is admissible to explain why the charges were made as they were irrespective of the question whether the son had authority from his father to give the directions. *Ibid*.

*Opinion: Experts.*

12. In an action for the price of lumber sold and delivered, where the question is whether the lumber was bought from the plaintiff for the defendant by a certain lumber broker while acting as the authorized agent of the defendant, a witness for the plaintiff should not be permitted to testify that the broker alleged to have bought the lumber was at that time the authorized agent of the defendant for the purchase and sale of goods for his account, this being a statement of the opinion of the witness. *Rice v. James*, 458.
13. In an action on a *quantum meruit* by an architect for compensation for

professional services in making preliminary plans for a building, the plaintiff, being an expert, may testify as to the value of his services and as to a universal usage among architects and builders to charge for preliminary plans one per cent of the estimated cost of the building. *Wheeler v. Anglim*, 600.

14. In an action by a workman against his employer for personal injuries from the bursting of a cast iron header to a boiler forming part of the steam main of the defendant's power plant, in which one question at issue is whether the material selected by the defendant for the pipe should not have been wrought iron instead of cast iron, it is competent for the plaintiff to show by an expert having special knowledge of the subject matter that in his opinion the best form and quality of cast iron is unsuitable for a pipe of this character on account of its brittleness under the temperature to which it is likely to be subjected. *Erickson v. American Steel & Wire Co.* 119.

Refusal by judge presiding at trial to allow question to expert witness that might have been based upon ground that experience of witness was not extended enough to qualify him to answer as expert, no ground for exception, see PRACTICE, CIVIL, 21.

#### *Circumstantial.*

In action by employee in factory against employer for injuries caused by bursting of steam pipe which was part of power plant, plaintiff rightly was allowed to go to jury upon evidence of defects in construction of appliances and of happening of accident, see NEGLIGENCE, 13, 14.

Evidence relating to circumstances of accident does not entitle plaintiff in action for negligence to go to jury if it leaves to conjecture manner in which accident happened, see NEGLIGENCE, 24, 36, 38.

#### *Proof of Foreign Law.*

15. Under R. L. c. 175, § 77, providing that "the existence, tenor or effect of all foreign laws may be proved as facts by parol evidence," the plaintiff in an action against the indorser of a promissory note which is governed by the law of New York may prove by his own answers on cross-examination, received without objection, that the note sued upon was presentable and payable on the day of its protest, which was without allowance for days of grace, although otherwise there is no evidence that days of grace had been abolished by statute in New York. *Demelman v. Brazier*, 588.

There is no presumption that statutes of New York contain provisions similar to R. L. c. 78, § 103, as to days of grace, see *ante*, 8.

#### *Testimony of Witness Insane since Former Trial.*

16. *Semble*, that the stenographic report of the testimony of a witness at a former trial of the same case who since that trial has become insane will be received in evidence, when the testimony is material to the issues on trial. *Temple v. Phelps*, 297.

*Declarations of Deceased Persons.*

Exception to admission in evidence under R. L. c. 175, § 66, *de bene* of declarations of deceased person, alleged to have been defendant's employee, based on objections that evidence not made competent by other evidence of employment, and that declarations were not of facts within personal knowledge of declarant, overruled because of lack of objection and motion to strike out by excepting party at trial, and because of other evidence of personal knowledge of declarant rightly admitted, see PRACTICE, CIVIL, 16, 41, 42.

*Records of Court.*

Construction of records of court in poor debtor proceeding, see POOR DEBTOR.

Record of district court imports verity and is presumed to be true until contrary is shown, see *ante*, 4; application of this principle to case involving records of District Court of Central Berkshire, see PRACTICE, CIVIL, 48.

*Application for Insurance.*

What can be introduced in evidence under R. L. c. 118, § 73, as application for insurance, see INSURANCE, 3-5.

*Proof of Fraud.*

Proof of fraud or misrepresentations of insured in procuring insurance, see INSURANCE, 7, 8.

*Communications between Attorney and Client.*

17. The exclusion of confidential communications between an attorney and his client does not extend to a statement made by the attorney to his client of what a witness at a hearing before a master testified to in a matter affecting the client's interests. *Temple v. Phelps*, 297.
18. In the trial of a writ of entry where the demandant claimed title as the purchaser of the land at a foreclosure sale, and the condition of the mortgage was that the tenant, who was the mortgagor, should pay a certain sum of money to his mother in each year during her life, and the tenant relied on the defence that the foreclosure sale was void because the condition of the mortgage was performed by him, the tenant put in evidence four receipts signed by his mother, who had died before the trial, to show payments of the sums due under the mortgage. The demandant called as a witness an attorney at law, who had acted for the tenant in another case in which there had been a hearing before a master, and who testified that the tenant's mother testified before the master in that case that she had not been paid the sums due under the mortgage and that the receipts signed by her were fictitious and she had signed them when they were sent to her by her son in order to relieve his mind when he was ill and there was trouble about the mortgage. The witness further testified against the objection of the tenant, that he afterwards had told the tenant what his mother had testified to before the master. The tenant contended that this

was a confidential communication between an attorney and his client and so was admitted improperly. *Held*, that the evidence was admitted properly, the statements made by the attorney to his client being a narration of facts testified to at a public hearing and there being nothing private or confidential about the communication. *Temple v. Phelps*, 297.

*Testimony at Former Trial.*

*Semble*, that stenographic report of testimony of witness at former trial of same case who since that trial has become insane will be received in evidence if material to issue being tried, see *ante*, 16.

*Force of Words.*

19. In considering the description of an accident by a witness little if any weight is to be given to expletive or declamatory words or phrases which appear to have been used in an exaggerated or distorted sense. *Foley v. Boston & Maine Railroad*, 332.

*Contradicting Witness on Material Matter.*

20. Previous material statements made by a witness contrary to those in his testimony are admissible for the purpose of contradicting him. *Paquette v. Prudential Ins. Co.* 215.

*In Rebuttal.*

21. In an action on a policy of life insurance where witnesses for the defendant have testified that the insured when he took out the policy appeared to be of unsound health and that his appearance gave indications of the excessive use of intoxicants, the plaintiff may be allowed to introduce evidence to rebut this testimony. *Paquette v. Prudential Ins. Co.* 215.

*Relevancy and Materiality.*

22. In an action for the price of goods sold and delivered, where the plaintiff seeks to show the liability of the defendant by proving a sale to a broker alleged to have been his agent, if it appears that the broker at a previous time was employed by the defendant as his local agent, it is right for the presiding judge to instruct the jury not to consider the former use by the broker of letter heads bearing the defendant's name on which the broker was designated as the defendant's local agent. *Rice v. James*, 458.
23. In an action on a *quantum meruit* by an architect for compensation for professional services in making preliminary plans for a building, where the defence is that the plans were furnished by the plaintiff in a competition with the understanding that the plaintiff should receive no compensation unless his plans were accepted, evidence offered by the defendant to show that other architects submitted preliminary plans for the building in competition and the correspondence of the defendant with such other alleged competing architects should be excluded as immaterial, unless it is shown that these matters were made known to the plaintiff. *Wheeler v. Anglim*, 600.

Evidence (*continued*).

24. In an action against a railroad company for personal injuries by a passenger, who was injured in a collision which occurred when he unnecessarily had left his seat in the passenger compartment of a combination car and was standing in the baggage compartment with his hand against the side of the car, and whose injuries were due in part to his exposed position, it is right for the presiding judge to exclude evidence offered by the plaintiff to show that it was customary for passengers passing between the towns between which the plaintiff was travelling to travel in the baggage compartment of the car and to have their tickets punched and taken by the conductor when there. *Bromley v. New York, New Haven, & Hartford Railroad*, 453.
25. In an action by a brother against his sister to recover the value of land which he conveyed to her by an absolute deed, the plaintiff testified that twenty-four years before the action was brought, being about to go to sea, he conveyed the land to the defendant so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted the land at any time she should reconvey it to him, that he returned, but the fact that he had given the deed to the defendant escaped his attention until it was recalled to him by a transaction about two years before his action was brought, when he demanded a reconveyance of the land, which the defendant refused. The presiding judge excluded evidence offered by the defendant to show acts of friendliness and kindness on the part of the defendant toward the plaintiff and their amicable relations. It was conceded by the plaintiff that the relations between them were entirely friendly and amicable down to the time when the plaintiff demanded a reconveyance. *Held*, that the exclusion was right, the evidence offered having no tendency to show that there was a consideration for the deed. *Cromwell v. Norton*, 291.
26. In an action by the trustee in bankruptcy of a co-operative trading corporation to recover money paid to the defendant by the manager of the corporation after it became insolvent, it appeared that the payment was of the sum of \$500 and was made by the manager to the defendant for "shares withdrawn." It was shown that the manager had no right to make the payment without authority from the board of directors, even if the company had been solvent. The jury found that the defendant was a shareholder of the corporation, that the manager was not authorized by the board of directors to make the payment to the defendant on account of the withdrawal of his shares, and that the corporation was insolvent at the time of the payment. The defendant contended that the manager by virtue of his position had authority to make the payment to the defendant. The only by-law of the corporation in regard to the withdrawal of money by stockholders on account of their stock gave the manager and the president acting jointly authority to permit a stockholder to withdraw a sum not exceeding \$10 and to submit the matter to the directors at their next meeting. Evidence was admitted, subject to the exception of the defendant, that in all cases of the withdrawal of sums greater than \$10, previous to the payment to the defendant, an application was made to the directors and the withdrawal was authorized by them before the money was paid

out. *Held*, that the evidence was admitted properly, being competent to controvert the defendant's contention as to the manager's authority to make the payment to the defendant. *Richardson v. Devine*, 386.

27. At the trial of an action against a street railway company for personal injuries incurred while entering as a passenger a car of the defendant at a station in a subway, the defendant, for the purpose of showing the conditions of its occupation of the subway, offered in evidence an agreement in writing between its predecessor in title and the Boston Elevated Railway Company, by which it contended that it would appear that the subway and the stations in it were constructed by the Boston Transit Commission and were owned by the city of Boston, that the platform at the station where the accident occurred was of the same width and in the same condition as when constructed by the commission, that the Boston Elevated Railway Company operated its cars in the subway under a lease of the subway, that the defendant operated its cars there under permission of the elevated railway company authorized by the Legislature, and that the elevated railway company had the entire management, charge and control of the subway, the stations and platforms, except that it could make alterations therein only by the permission of the Boston Transit Commission. The judge excluded the agreement. The agreement related principally to the pecuniary relations between the parties, but contained a provision that the cars of the defendant's predecessor in title while on the tracks in the subway should be subject to "the rules of the elevated railway company and the reasonable directions of its officials." There was no offer to show what rules, if any, had been established by the elevated railway company, or what "reasonable directions," if any, had been given to the defendant, nor was there any offer to show that the defendant had not been given full power to make whatever police arrangements might be necessary for the proper supervision of any expected crowds of passengers. It was conceded at the trial that the defendant held out the station where the accident occurred as a proper place for its passengers to go to for the purpose of taking its cars. *Held*, that, the plaintiff having gone to the station by the defendant's invitation, the defendant could not be injured by the exclusion of the agreement; that the details of the agreement did not appear to be material to the issues raised at the trial, and its effect if admitted might have been to distract the attention of the jury from the true issues of the case; so that there was no error in its exclusion. *Kuhlen v. Boston & Northern Street Railway*, 341.

In action on policy of life insurance where answer is general denial proofs of death are material evidence for plaintiff, see *INSURANCE*, 6.

Where bill of exceptions does not show that papers offered as evidence and excluded contained material evidence, exception to exclusion cannot be sustained, see *PRACTICE, CIVIL*, 83.

Answer of witness which does not tend to show facts sought to be established by it, especially if such facts are admitted by party offering exception, held rightly excluded, see *PRACTICE, CIVIL*, 89.

Fact that broker who was agent of insurance company and procured for customer policy on building as dwelling house had maps in office showing



*Evidence (continued).*

building insured to be partly store and partly dwelling house is immaterial as affecting insurance company's non-liability on policy, see *INSURANCE*, 2.

Evidence that town had made appropriation for repairs and maintenance of streets sufficient to keep them in proper condition is not material in action against town by one injured because of defect in public way, see *WAY*, 3.

Evidence of custom of street railway company to "slow down" cars for passengers to board them while in motion is immaterial on question whether car started suddenly after being stopped, and if plaintiff had attempted to board car in motion custom still would be immaterial unless shown to have been known to plaintiff and acted upon by him, see *NEGLIGENCE*, 27.

*Remoteness.*

28. In an action against a city under R. L. c. 51, § 18, for injuries from a fall caused by slipping on Hyatt lights forming part of the sidewalk of a highway of the defendant, it is within the discretion of the presiding judge to admit or exclude evidence offered by the defendant to show "that the walk was of the usual and ordinary construction for that kind of a walk," and, even if in the opinion of this court the discretion of the presiding judge would have been exercised better by admitting the evidence, its exclusion by him is not a ground of exception. *Moynihan v. Holyoke*, 26.
29. In an action by a boy employed by a manufacturer of jewelry against his employer for personal injuries alleged to have been caused by a dangerous acid splashing in the plaintiff's face and eyes when he was sent without proper instructions and with unsuitable appliances to fetch some of it in a pitcher from a large jar standing in the yard of the factory, the defendant contended that the accident was caused by the plaintiff tipping the large jar a little and then slipping, and dropping the jar so that the acid splashed in his face. The defendant put in evidence the deposition of the person in its employ who sent the plaintiff for the acid and who testified that it was about ten or fifteen minutes after the plaintiff was injured when he saw the jars containing acid and those used in transporting it. The following questions and answers in the deposition, on objection by the plaintiff, were excluded by the judge: "What was the location and condition of the jars referred to when you first saw them after the plaintiff was injured? The jar had been moved about two or three inches. Was there any acid after the accident in the pitcher that the plaintiff carried down with him before the accident? There was not." A witness for the defendant, who testified that he saw the jars about twenty minutes or half an hour after the accident, said on his cross-examination that for all he knew a dozen or more persons might have gone into the yard from the time the plaintiff was injured up to the time he saw the jars. The defendant made no offer to show that the condition of things had not changed between the happening of the accident and the time referred to in the questions and answers excluded. *Held*, that, although the interval was short, this court could not say that the likelihood that other persons might have gone to the jar for acid was so slight that the exclusion of the evidence was a wrongful exercise of the discretion of the presiding judge. *Hodde v. Attleboro Manuf. Co.* 237.

Refusal by judge presiding at trial to allow question to expert witness that might have been based upon remoteness of testimony sought from issue being tried is not ground for exception, see PRACTICE, CIVIL, 21.

*Extrinsic affecting Writings.*

30. In an action by a brother against his sister to recover the value of land which he conveyed to her by an absolute deed, he can be allowed to show by oral evidence that, being about to go to sea, he conveyed the land to the defendant so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted the land at any time she should reconvey it to him. *Cromwell v. Norton*, 291.
31. In an action by an insurance company against the surety on the bond of an agent of the plaintiff given for the faithful performance of his duties, where the defence is that the defendant was discharged from further liability by a change in the contract under which the agent was employed made without the knowledge of the defendant, and where the contract is not described fully in the bond, it is competent for the defendant to prove by oral evidence the terms of the contract between the plaintiff and its agent to show the nature and extent of the defendant's liability. *Germania Ins. Co. v. Lange*, 67.
- Evidence is admissible to show that book entries charging certain goods to son were really entries of sales of goods to his father charged to son by request, see *ante*, 10, 11.
- Where goods were ordered from plaintiff on printed blank stating that sale was made on representations thereon and no others and that agent selling goods was not authorized to make other representations, defendant cannot repudiate sale after delivery on ground that agent of plaintiff procured order by false representations, see CONTRACT, 9.

*Hearsay.*

32. In an action for the price of goods sold and delivered, where the plaintiff seeks to show the liability of the defendant by proving a sale to a broker alleged to have been the agent of the defendant, if the broker is not a party or a witness in the case, a letter written by him to an outside person offered in evidence by the plaintiff should be excluded as mere hearsay. *Rice v. James*, 458.

*Of Intent.*

33. Where in a suit in equity a party desires to prove that a conveyance of land to certain persons called trustees to their own use was upon a certain trust, although it may be important to show what trust should have been declared by the grantees or what trust resulted from the payment of the purchase money, the intention of the grantor in making the deed is immaterial and cannot be shown. *Lee v. Methodist Episcopal Church*, 47.
34. At the trial of a probate appeal, upon the issue whether the instrument offered as a will was procured by the undue influence of the son of the

*Evidence (continued).*

testator, the contestants called the son as a witness and examined him at length as to his relations with the testator. During his cross-examination, after several objections to questions propounded by counsel, the presiding justice put the following question: "Now, in reference to the subject of influencing your father, or those things which might naturally tend to influence your father about the making of the will, did you say or do anything with a view to such influence?" The witness answered, "No, sir." The contestants excepted to the question. *Held*, that the intent of the witness was relevant and competent, and that the question was a proper one. *Sherman v. Sherman*, 400.

*Of Operation of Mind to show Effect of Fraud.*

Ignorance on part of indorser of note of legal effect of known facts relieving him of liability is admissible as evidence showing operation of his mind upon question whether his action was induced by fraud in procuring written waiver of "demand, notice and protest" after time for demand had passed, see *BILLS AND NOTES*, 1, 2.

*Likely to distract Attention of Jury.*

Detailed agreement showing conditions of occupancy of subway by defendant held rightly excluded as immaterial evidence likely to distract attention of jury from true issues of case, see *ante*, 27.

*Procured by Lying and Deceit.*

85. At the trial of an indictment under R. L. c. 212, § 16, as amended by St. 1905, c. 316, for knowingly distributing and circulating a card conveying notice of a place where directions and information might be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child, where it appears that the card described in the indictment was given by the defendant to a witness for the Commonwealth, who was a police officer in disguise, in response to an inquiry by him as to treatment for a proposed patient, the evidence of the delivery of the card is none the less admissible because it was procured by lying and deceit on the part of the witness, and it is a question for the jury whether the card was delivered voluntarily with a criminal purpose. *Commonwealth v. Hartford*, 464.

## EXECUTION.

Nothing passed by seizure and sale under execution of alleged interest of father in whose possession his daughters had placed building, which had belonged to his deceased wife as personal property and which she had bequeathed to daughters, under agreement with daughters that he should take charge of it, collect rents, pay expenses, keep \$3 a week for living expenses and pay balance to them, because agreement of daughters was executory and conveyed no interest in property, see *CONTRACT*, 10.

## EXECUTOR AND ADMINISTRATOR.

*Power and Duties.*

1. An executor or administrator cannot be allowed by reason of his position of trust to gain an advantage which he would not otherwise possess in regard to his own indebtedness to the estate of his testator or intestate. *Coffey v. Coffey*, 398.
2. An executor with the consent of the devisees under the will of his testator may collect the rents of real estate or occupy real estate of his testator, accounting for the income to the Probate Court as provided by R. L. c. 150, § 6. *Forbes v. Keyes*, 88.

Executor who makes attempted sale and conveyance of testator's real estate erroneously supposing that will gives him power to make such sale, when there is sufficient personal property to pay all debts and charges of estate, does not commit breach of bond, see *post*, 7, 9.

Question whether administratrix with will annexed with consent of sole co-legatee can convey building which is personal property to testator's husband for life with reversion to legatees, the estate being free from debt, mentioned but not decided, see CONTRACT, 10.

Contract under seal for employment of agent in distant State for management of principal's real estate there which contains provision that in case of death of principal before contract is completed his executor shall carry it out, and which is accompanied by letter containing further agreement of principal to add codicil to his will directing executor in accordance with contract, is not invalid as unlawfully interfering with settlement of principal's estate and is broken by executor's refusing to perform it although promised codicil never was made, see CONTRACT, 5, 18.

*Accounts.*

3. A transfer by an executor to himself of shares of stock belonging to his testator unexplained is in itself a wrongful conversion. In the present case there was an express statement in the account of an executrix of an appropriation and conversion to her own use of property of her testator which included the shares in question. *Holland v. Ball*, 80.
4. A son was the agent of his mother to collect rents, and during her lifetime without her consent but with the consent of his brother, then living, expended these rents upon property which he and his brother owned jointly. The brother died and his interest in the property on which the money had been expended passed to his children. Later the mother died intestate, and her surviving son was appointed the administrator of her estate. He and the children of his deceased brother were the only persons interested in her estate. The children of the deceased brother contended that the administrator should be charged in his account with the amount of rents collected by him before the death of the intestate and disposed of without her authority. *Held*, that he was none the less chargeable with the amount of such rents wrongly dealt with by him

*Executor and Administrator (continued).*

because the other persons interested in the estate had received the advantage of the wrongful expenditure in the same proportions in which they were entitled to share in the estate. *Coffey v. Coffey*, 398.

Executor with consent of devisees may collect rents of or occupy real estate of testator, accounting for income to Probate Court under R. L. c. 150, § 6, see *ante*, 2.

Where executor fails to file account within time required by his bond, but later does so, and three years after first account files second account which is allowed with consent of all parties interested, such consent is waiver of all previous breaches of bond in not rendering accounts, see *post*, 8.

Assent by devisees to accounts of executor in which, there being sufficient personal property to pay all debts and charges of estate, he has charged himself with receipt of moneys from sales of real estate of testator made by him under erroneous belief that will gave him power to make such sales, and receipt by them of proceeds of such sales without objecting to their validity, estop them from questioning propriety of action of executor in making sales or from alleging such action as breach of executor's bond, see *post*, 9.

*Misappropriation.*

Unexplained transfer by executor to himself of shares of stock belonging to testator is in itself wrongful conversion, see *ante*, 3.

*Distribution of Residue.*

5. Whether when a residuum under a will is to be distributed a decree of distribution is necessary, *quaere*. *Forbes v. Keyes*, 38.

Share of residue not due until demanded, see *post*, 6.

*Liability on Bond.*

6. No action under R. L. c. 149, § 23, can be maintained on an executor's bond for a failure to pay the shares in a residuum of the estate of his testator where there has been no previous demand for such payment. *Forbes v. Keyes*, 38.

7. It is not a breach of an executor's bond for the executor, when there is sufficient personal property to pay all debts and charges of the estate, to make an attempted sale and conveyance of real estate of his estate, to erroneously supposing that the will gives him power to make such a sale when in fact it does not. *Ibid*.

8. Where an executor fails to file an account in the Probate Court within the time required by his bond, but afterwards files an account and three years later files another, and this second account is allowed with the consent of all the parties interested, such consent to the allowance of the account is a waiver of all previous breaches of the bond in not rendering an account. *Ibid*.

9. If an executor, when there is sufficient personal property to pay all debts and charges of the estate, makes attempted sales and conveyances of real estate of his testator, erroneously supposing that the will gives him power to make such sales when in fact it does not, and the devisees under the

will, instead of asserting their title to the real estate, accept and receipt for large sums of money received by the executor from these sales of real estate without making any objection to the validity of the sales, the title conveyed or the prices received, and assent to the accounts of the executor in which he has charged himself with the proceeds of the sales, they are estopped to question the propriety of the action of the executor in making the sales or to allege this action as a breach of his bond. *Forbes v. Keyes*, 88.

### FALSE REPRESENTATIONS.

One ordering goods on printed blank which states that sale is made on representations therein and on no others and that agent making sale has no authority to make representations cannot after delivery of goods repudiate sale on ground that sale was procured by false representations of agent, see **CONTRACT**, 9.

False representations of applicant for insurance as defence to action on policy, see **INSURANCE**, 7, 8.

### FIRE.

Insurance against loss or damage by fire, see **INSURANCE**, 1, 2.

Questions of admission in evidence of declarations of deceased persons under R. L. c. 175, § 66, at trial of action for injuries alleged to have been caused by negligence of defendant in use of fire on his land which spread to plaintiff's woodlot, see **PRACTICE, CIVIL**, 16, 41, 42.

Contract to convey land with buildings thereon for entire price where buildings are destroyed by fire before time fixed for conveyance, see **CONTRACT**, 16, 17.

### FRAUD.

Defence of fraud in procuring contract not to do specified business in designated territory for certain period held not sustained by facts, see **CONTRACT**, 7, 8.

Where, under contract for employment of agent in distant State to manage principal's real estate interests there, agent brings action for services, neither principal nor his personal representative can rely in defence upon fraud of agent when acting in behalf of principal toward another estate of which agent was administrator, especially where acts complained of were ratified by principal or his personal representative after full knowledge, see **CONTRACT**, 19.

If no demand is made by payee on maker of note within time required to charge indorser, and indorser, knowing facts which have released him from liability but not their legal effect, writes on back of note waiver of "demand, notice and protest," in absence of fraud his ignorance of legal effect of facts will not render waiver ineffectual; fact of such ignorance of legal effect of circumstances is evidence of operation of mind admissible as bearing on question of fraud, see **BILLS AND NOTES**, 1, 2.

## FRAUDS, STATUTE OF.

*Contract for Sale of Interest in Land.*

1. In *Hayes v. Jackson*, 159 Mass. 451, the majority of the court did not decide that in the provision, now contained in R. L. c. 74, § 2, that a memorandum of a contract under the statute of frauds need not set forth the consideration, the word "consideration" means price, and it is the unanimous opinion of the court that the doctrine of *Hayes v. Jackson* should not be extended. *Bogigian v. Booklovers Library*, 444.

2. In an action for the alleged breach of an oral contract to take from the plaintiff a lease of a certain store and to furnish a guarantor of the rent, if the defendant sets up the statute of frauds and it appears that the plaintiff refused to give a lease to the defendant because the defendant failed to furnish a guarantor of the rent, the plaintiff cannot satisfy the statute by producing a letter signed by the defendant containing all the terms of the alleged oral contract except the agreement to furnish a guarantor. *Ibid.*

If owner without consideration executes absolute deed of land in order that grantee may execute mortgage of it to secure money lent grantor, and has deed recorded but retains possession of it, and grantee executes mortgage as requested, making of mortgage constitutes acceptance of deed and no manual delivery is necessary; and bill in equity cannot be maintained against grantee by grantor to cancel deed except as to mortgage, see DEED; EQUITY JURISDICTION, 7.

*Trust concerning Land.*

Where one conveys land to another under oral agreement to reconvey which grantee refuses to perform and grantee sets up statute of frauds, R. L. c. 147, § 1, grantor can recover value of land on ground of failure of consideration, see CONTRACT, 12.

*Contract for Sale of Goods for Price of Fifty Dollars or more.*

3. A memorandum of a contract for the sale of goods which does not name the price is not sufficient to satisfy the statute of frauds. *Kemensky v. Chapin*, 500.

4. Under an oral contract for the sale of goods by sample the receipt and examination of the goods by the buyer merely for the purpose of ascertaining whether they correspond with the sample do not constitute an act of acceptance. *Ibid.*

5. Under an oral contract for the sale of goods by sample, a delivery of the goods by the seller upon a railroad car sent by the buyer to receive the goods for transportation to him, although it is a delivery to the buyer, does not constitute also an acceptance sufficient to satisfy the statute of frauds. *Ibid.*

6. Where there is an oral contract for the sale by sample of goods for the price of \$50 or more, and the buyer receives and examines the goods merely for the purpose of ascertaining whether they correspond with the

sample, without accepting them as those that he purchased, and arbitrarily and unreasonably refuses to accept them, if the seller sues for damages for the breach of the contract and the defendant sets up the statute of frauds, and there is no memorandum in writing of the bargain sufficient to satisfy the statute and no part payment, the plaintiff cannot recover on showing that the goods delivered by him were in accordance with the sample and that the defendant ought to have accepted them. *Kemensky v. Chapin*, 500.

*New Promise to pay Debt discharged by Bankruptcy.*

7. Under R. L. c. 74, § 8, a plaintiff can recover on a new promise to pay a debt barred by a discharge in bankruptcy only by showing a definite and unequivocal promise in writing to pay such debt signed by or in behalf of the defendant. Expressions of a willingness to pay and of an expectation of financial ability to make payments on the debt are not sufficient. *Nathan v. Leland*, 576.
8. The expressions in a letter written and signed by a bankrupt "I shall be able to make you a voluntary payment of at least \$5 per month and I hope after six months time to be able to increase the amount. . . . I have so arranged matters with my assignee that there will be nothing to prevent my regular payment of \$5 per month on old account," contain no absolute promise to pay a debt barred by the writer's discharge in bankruptcy sufficient to satisfy the requirement of R. L. c. 74, § 8. *Ibid.*
9. A letter written and signed by a bankrupt in which he writes "I am sorry to say to you that the payments on your former account I shall not be able to make immediately as I wished to do," and says at the close "You are not to regard yourself as in any danger of losing the amount, as long as I hold my present position, because I have promised in time to take care of it, but I must have time to do it, as it will be done as fast as resources will allow" contains a distinct and unqualified promise to pay by instalments a debt barred by the writer's discharge in bankruptcy sufficient to satisfy the requirement of R. L. c. 74, § 8. *Ibid.*

GAMING.

1. To justify a conviction on a complaint under R. L. c. 214, § 5, for keeping a common gaming house, it is not necessary for the Commonwealth to show that gaming was the only or the principal purpose for which the premises were kept by the defendant. It is sufficient if it was one of the purposes. *Commonwealth v. Charlie Joe*, 833.
2. To justify a conviction on a complaint under R. L. c. 214, § 5, for keeping a common gaming house, it is not necessary for the Commonwealth to show that the place was open to the public. It is sufficient to show that any number of persons were in the habit of resorting there for illegal gaming. *Ibid.*
3. To justify a conviction on a complaint under R. L. c. 214, § 5, for keeping a common gaming house, it is not necessary for the Commonwealth to show that the defendant kept the place for any special gain to himself.



Gaming (*continued*).

- It is enough if he took his chance at the game with the others, the other elements of the offence being made out. *Commonwealth v. Charlie Joe*, 583.
4. On the trial of a complaint under R. L. c. 214, § 5, for keeping a common gaming house it is not necessary for the Commonwealth to show that the whole of the premises controlled by the defendant were used for the purpose of unlawful gaming. It is sufficient to justify a conviction if any one of the rooms of such premises was used for this purpose. *Ibid*.

### GOOD WILL.

Sale of good will of manufacturer to competitor upheld as valid under circumstances and covenant not to engage in same business for certain period in designated territory enforced in equity, see **CONTRACT**, 7, 8.

### GRADE CROSSING ACTS.

St. 1900, c. 439, § 6, apportioning part of cost of completion of Acushnet River Bridge between New Bedford and Fairhaven upon Old Colony Railroad Company above road of which such bridge passes instead of crossing it at grade is constitutional, see **ACUSHNET RIVER BRIDGE**, 1.

### GUARANTY.

Surety on bond of agent of insurance company for faithful discharge of his duties to company is discharged from further liability by substantial change in conditions to which bond relates without his knowledge and consent, see **SURETY**, 1, 2.

In action against surety on bond of agent of insurance company for faithful performance of his contract with company, where defence is variation in terms of contract of agency after bond was given without knowledge and consent of surety, and where contract between agent and company was not fully described in bond, oral evidence offered by defendant to prove exact terms of agent's contract is admissible, see **EVIDENCE**, 81.

### HIGHWAY.

See **WAY**.

### HUSBAND AND WIFE.

For marriage and divorce, see that title.

Action by husband against father of his wife for alienation of her affection held rightly submitted to jury on question whether defendant was actuated by malice toward plaintiff, see **ALIENATION OF AFFECTION**, 1, 2.

Contract of married man transferring money, practically all his property, under agreement that donee shall hold and care for it and provide donor with sums required for his support or demanded by him during his life and that money after donor's death shall become donee's property is not invalid as against donor's widow, see **CONTRACT**, 4.

## HYATT LIGHTS.

Whether Hyatt lights set in cement or concrete constitute defect in highway in cold and stormy weather, see *WAY*, 4; evidence in action for injuries from slipping upon, see *EVIDENCE*, 28.

## ICE AND SNOW.

Landlord who has leased premises for term of years under lease reserving right at reasonable times to enter "to view the premises, and make repairs and improvements," not liable for injuries caused by snow falling from roof, see *LANDLORD AND TENANT*, 4.

## INSANE PERSON.

*Semble*, that stenographic report of testimony of witness at former trial of same case who since that trial has become insane is admissible as evidence if material to issue, see *EVIDENCE*, 16.

## INSURANCE

*Fire.*

1. There can be no recovery on a policy against fire insuring a building as a "dwelling house" if the building was used in part as a dwelling house and in part as a store. *Bowditch v. Norwich Union Ins. Co.* 565.
2. In an action against a fire insurance company on a policy insuring a building as a dwelling house, which fails because the building was not a dwelling house for the purpose of insurance, having a shoe store in the basement and a dry goods store on the street floor, the facts that the insurance was procured for the plaintiff by an insurance broker, who was an agent of the defendant, and that this broker had maps in his office showing the character of the building, are immaterial, although the plaintiff may have a cause of action against the broker for negligence in failing to obtain for the plaintiff a valid policy when he had an opportunity of knowing the facts. *Ibid.*

*Life.*

## Application.

3. Where a policy of life insurance incorporates by reference the application of the insured, the word "application" includes all the questions and answers on both sides of the paper containing the application which are signed by the insured, including the declarations made and signed by him in the presence of the medical examiner of the insurer and excluding only the medical examiner's report. *Paquette v. Prudential Ins. Co.* 215.
4. In an action on a policy of life insurance, an answer of the insured to a question on the back of his application, which under the provisions of R. L. c. 118, § 73, cannot be admitted in evidence because no copy of the

*Insurance (continued).*

contents of the back of the application was attached to the policy, is not made admissible by the fact that a copy of the face of the application, which was attached to the policy, has been admitted in evidence without any objection by the plaintiff. *Paquette v. Prudential Ins. Co.* 215.

5. In an action upon a policy of life insurance which incorporates by reference the application of the insured, where there was attached to the policy a copy of the contents of one side of the paper on which the application was written with the signature of the insured but no copy of the contents of the other side of the paper containing the declarations made and signed by the insured in the presence of the medical examiner of the defendant, the defendant under the provisions of R. L. c. 118, § 73, cannot introduce in evidence a question and an answer of the insured thereto which are written on such other side of the original paper no copy of which was attached to the policy. *Ibid.*

*Proof of death.*

6. In an action on a policy of life insurance where the defendant's answer contains a general denial, the proofs of death required by the terms of the policy are material to the plaintiff's case and so are admissible in evidence. *Ibid.*

*Fraud or misrepresentations of insured.*

7. In an action on a policy of life insurance, if the defendant sets up in his answer that the policy was made voidable by material misrepresentations of the insured as to his health and habits of sobriety, the burden is on the defendant to prove these allegations. *Ibid.*
8. In an action on a policy of life insurance, if the defendant offers in evidence the answer of the insured to a question on the back of his application, no copy of which was attached to the policy, and seeks to have it admitted as a misrepresentation which was part of a general scheme of fraud, it is not enough to make this evidence admissible that the defendant in his answer alleged a fraudulent conspiracy to obtain a series of policies on the life of the insured. Before such evidence can be admitted the defendant must have laid a foundation for it by previous evidence of fraud. *Ibid.*

Testimony in defence of action on insurance policy that insured appeared of unsound health when he took out policy and gave evidence of excessive use of intoxicants may be met by plaintiff with evidence in rebuttal, see EVIDENCE, 21.

*Interest of non-resident in policy pledged in this Commonwealth.*

Liability of Massachusetts corporation under policy of life insurance held by citizen and resident of another State and in possession of pledgee in this Commonwealth is such property within this Commonwealth as gives jurisdiction to proceed *in rem* against it without personal service on holder of policy, see JURISDICTION; and interest of pledgor thus can be reached by suit in equity to reach and apply equitable assets of debtor under R. L. c. 159, § 3, cl. 7, see EQUITY JURISDICTION, 5; JURISDICTION.

*Bond of Insurance Agent.*

In action against surety on bond of agent of insurance company for faithful performance of his contract with company, where defence is variation in terms of contract of agency since bond was given without knowledge and consent of surety, and where contract between agent and company was not fully described in bond, oral evidence offered by defendant to prove exact terms of agent's contract is admissible, see EVIDENCE, 31; and, if change in conditions to which bond relates without knowledge and consent of surety is shown, surety is discharged, see SURETY, 1, 2.

## INTEREST.

Where interest is to be allowed on money due the computation is to be of simple interest unless there is an express requirement to the contrary. *Tisbury v. Vineyard Haven Water Co.* 196.

Interest on sums apportioned by commissioners appointed under St. 1893, c. 368, and subsequent statutes to apportion cost of Acushnet River bridge between New Bedford and Fairhaven not being provided for by statute, cannot be charged before judgment, see ACUSHNET RIVER BRIDGE, 4.

## JOINT TORTFEASOR.

Commonwealth cannot be sued as tortfeasor, and therefore release of Commonwealth by civil engineer, employed by State board of commissioners to take charge of and inspect certain work in behalf of Commonwealth, from liability for injury caused by negligence of employee of one doing work under contract with Commonwealth does not release such contractor, see RELEASE, 1-3.

## JUDGMENT.

Construction of St. 1869, c. 416, § 5, with regard to District Court of Central Berkshire, and application to facts as to entry of judgment therein without specific order or any standing or general order of Court, see PRACTICE, CIVIL, 48.

Action pending against one adjudicated bankrupt in which defendant was defaulted is not ripe for judgment if motion for continuance based on fact of bankruptcy is pending, see BANKRUPTCY, 2, 3.

Decree of "Bill dismissed" in suit in equity by trustee of bankrupt's estate to set aside bills of sale and obtain possession of personal property of bankrupt in defendant's possession, is final decree upon merits, includes and disposes of everything that was or might have been litigated in case and is bar to action of tort against same defendant by one who during pendency of suit purchased from trustee certain property of bankrupt not included in bills of sale but included in property of bankrupt claimed in suit in equity, see EQUITY PLEADING AND PRACTICE, 7-9.

## JURISDICTION.

A liability of a Massachusetts corporation upon a policy of life insurance held by a citizen and resident of another State and in the possession of a pledgee in this Commonwealth is such property within this Commonwealth as gives jurisdiction to proceed *in rem* against it without personal service on the holder of the policy. *Biggart v. Straub*, 77.

No jurisdiction in Supreme Judicial Court to allow amendment to bill of exceptions, see PRACTICE, CIVIL, 80.

Supreme Judicial Court and Superior Court still have jurisdiction over suits in equity to remove cloud from title, such jurisdiction not having been transferred to Land Court by St. 1904, c. 448, § 1, see EQUITY JURISDICTION, 6.

It is not within jurisdiction of Superior Court to allow petitioner for damages under statute to amend petition by adding separate claim barred by limitation of statute at time of amendment, see SUPERIOR COURT, 1-3.

No attachment by special precept in Superior Court under R. L. c. 167, § 80, can be made by trustee process unless one of alleged trustees dwells in or has his usual place of business in county where action is pending, see ATTACHMENT.

Determination of commissioners appointed under St. 1893, § 6, and subsequent statutes, to determine and name cities and towns which shall pay expenses of care, maintenance and repair of Acushnet River bridge between New Bedford and Fairhaven and proportion to be paid by each is not subject to revision, see ACUSHNET RIVER BRIDGE, 5.

Appeal from judgment of Superior Court overruling plea in abatement in bastardy process under R. L. c. 82, entered before St. 1902, c. 842, § 2, was in force, and based on lack of allegation in complaint in municipal court that defendant either lived or had usual place of business in district of court, held not to lie under R. L. c. 173, § 96, although it went to substance of court's jurisdiction; and, if plea could be treated as motion to dismiss, motion was held rightly denied since proceedings in lower court were initiatory only and case was really in Superior Court which has jurisdiction if either complainant or defendant resides in county or judicial district where case heard, see PRACTICE, CIVIL, 1-3.

## LACHES.

Petition for writ of mandamus to compel reinstatement as janitor of police station filed by veteran wrongfully removed from employment under civil service law and rules is not barred merely because brought two years and one month after such removal, see VETERAN, 1.

Delay of over two years by veteran in bringing petition for writ of mandamus to compel reinstatement as messenger in printing department of city, where petitioner in meantime either has prosecuted litigation as to same matter or has been compelled by poverty to wait, is not such laches as to bar petition, see VETERAN, 6, 7.

## LAND COURT.

*Jurisdiction.*

Jurisdiction over suits in equity to remove cloud from title was not transferred by St. 1904, c. 448, § 1, from Superior Court to Land Court, but such suits still remain within general equity jurisdiction of Superior Court and Supreme Judicial Court, see EQUITY JURISDICTION, 6.

*Appeal.*

Under St. 1902, c. 458, § 1, St. 1904, c. 448, § 8, and St. 1905, c. 288, on an appeal from the Court of Land Registration or the Land Court to the Superior Court, the issues for the jury must be framed in the court from which the appeal is taken, and such a framing of issues is necessary to complete the appeal. *Foss v. Atkins*, 486.

## LANDLORD AND TENANT.

*Liability for Taxes.*

1. St. 1904, c. 385, provides that lands of the Commonwealth "known as the Commonwealth Flats, shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof." A lease for business purposes of land on the Commonwealth Flats, made by the Commonwealth before the enactment of this statute, contained a covenant of the lessor of quiet enjoyment by the lessee, and a covenant of the lessee to pay the rent, "and also all water rates and all taxes which may be assessed upon any buildings, fixtures or other property put upon said premises by the lessee and which are between the parties hereto treated as and agreed to be personal property." Under the statute above named the city of Boston demanded from the lessee the payment of a tax assessed upon the land, and the lessee paid the tax, and sued the Commonwealth for the amount thus paid. *Held*, that, whether or not R. L. c. 12, § 20, is applicable to the Commonwealth, the lessee by a petition under R. L. c. 201 could recover from the Commonwealth the amount of the tax on the land thus paid by him. *Boston Molasses Co. v. Commonwealth*, 387.

Part of Commonwealth Flats held under bond for deed from Commonwealth and used for business purposes is not taxable as leased land under St. 1904, c. 385, see TAX, 14.

*Covenant of Lessee running with Land.*

2. The lease of a farm for three years, containing no restriction as to its assignment, gave the lessees the right to purchase the premises at any time during the term at their option, at a different price named for each of the three years. The lessees covenanted "to make all repairs needed or required by them to revert to the owners," and also "to make improvements on said premises to the value of at least \$1,000 during said term and to leave the same therein at the end of said term if they do not purchase the premises." Within three months the lessees assigned the lease

*Landlord and Tenant (continued).*

to a corporation organized for the purpose of selling poultry, which took possession of the premises and erected and occupied certain poultry buildings. Neither the original lessees nor their assignee attempted to exercise the option to purchase the premises. There was a default in the payment of rent, and the lessors brought a summary process against the lessees for possession of the premises and recovered judgment. The assignee voluntarily vacated the premises while the summary process was pending. A creditor of the assignee attached the poultry buildings as its property, obtained judgment, sold the buildings on execution and purchased them at the execution sale. In a suit in equity brought by the lessors against the purchaser at the execution sale to enjoin him from removing the buildings from the plaintiffs' land, it was *held*, that the covenant in the lease, to make improvements on the premises during the term and to leave such improvements thereon at the end of the term if the lessees did not purchase the premises, ran with the land and was binding on the assignee of the lease; therefore that the buildings upon their erection became part of the realty and no title passed to the defendant under the execution sale, and the plaintiffs were entitled to a decree. *Peters v. Stone*, 179.

*Liability of Landlord to Tenant for Personal Injuries.*

3. If the outside steps of a house in the control of a landlord and used by a tenant appeared to be strong and safe at the time of the letting but contained a hidden defect, the landlord must do more than keep the steps in the condition in which they were at the time of the letting and must use due care to keep them as strong and safe as they then appeared to be, the tenant taking the risk only of obvious defects. *Andrews v. Williamson*, 92.

*Liability to Third Person.*

4. Where a building having a steep and unguarded roof sloping toward the sidewalk of a highway is leased by its owner for a term of years, the lessor reserving the right at reasonable times to enter "to view the premises, and make repairs and improvements," the owner is not liable to one who is injured by a mass of snow sliding from the roof owing to the failure of the tenant after a severe snow storm to take the usual measures to clear away the snow so far as possible or to do anything to prevent such an accident. *Neas v. Lowell*, 441.

*Tenancy by Sufferance.*

Action of contract will not lie for sufferance rent on allegations that defendant forcibly entered plaintiff's close, appropriated part thereof for sidewalk purposes and continued in possession for nearly twenty years, see PLEADING, CIVIL, 2.

## LEGITIMACY.

If, at a hearing on the objections of a wife to making absolute a decree nisi for a divorce obtained against her for cruel and abusive treatment, the

libellee shows that a child was born to her after the decree *nisi* was granted and that the date of its birth is consistent with its having been begotten by an act of intercourse which the libellee set up before the decree *nisi* as condonation on the part of her husband, and the judge finds on a review of the evidence, including the testimony of the husband, that there was no condonation because there was no act of intercourse between the husband and wife at the time alleged and testified to by the libellee, this finding, although it may imply adultery on the part of the libellee, does not affect the legitimacy of the child, as the evidence properly considered by the judge upon the issue of the condonation would not be competent to show that a child thus born in wedlock was illegitimate. *Koffman v. Koffman*, 593.

### LIBEL AND SLANDER.

1. In an action purporting to be by a married woman for charging her with the crime of adultery by spoken words, in the absence of any evidence tending to show that the plaintiff was not married it is sufficient for her to show that she was reputed to be a married woman. *Ward v. Merriam*, 135.
  2. In an action for slander the words "W. (meaning the plaintiff's husband) has sold half of his wife to L. hasn't he?" may be found under the circumstances in which they were used to have been spoken in such a sense as to amount to a charge of adultery, and the fact that the statement was put in the form of a question makes it none the less slanderous. *Ibid.*
- Questions of practice and evidence arising at trial of action for slander in speaking words "W. (meaning plaintiff's husband) has sold half of his wife to L. hasn't he?", see PRACTICE, CIVIL, 43-45.

### LIMITATIONS, STATUTE OF.

In an action by a brother against his sister to recover the value of land which he conveyed to her by an absolute deed, in which the defendant set up the statute of limitations, the plaintiff testified that twenty-four years before the action was brought, being about to go to sea, he conveyed the land to the defendant so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted the land at any time she should reconvey it to him, that he returned, but the fact that he had given the deed to the defendant escaped his attention until it was recalled to him by a transaction about two years before his action was brought, when he demanded a reconveyance of the land, which the defendant refused. It appeared that in the first year after the conveyance the defendant had sold a part of the land and had paid the proceeds to the plaintiff. She claimed the rest of the land as an absolute gift. *Held*, that the statute of limitations did not begin to run until there was a demand for a reconveyance and a refusal, that the fact that the defendant sold a part of the land and accounted to the plaintiff for the proceeds did not constitute a repudiation of the agreement as to the remaining land, and that it would have been wrong to comply with a request of the defendant



Limitations, Statute of (continued).

to instruct the jury that if the agreement was as testified to by the plaintiff the sale constituted a violation of it and the right of action accrued then and was barred by the statute. *Cromwell v. Norton*, 291.

Defence of statute of limitations must be taken by answer and not by demurrer, see PLEADING, CIVIL, 3.

Petition for damages under statute may not be amended in Superior Court by adding separate claim barred by limitation of statute, see SUPERIOR COURT, 1-3.

Action of landowners against city on alleged contract to pay certain specified amounts as damages to plaintiffs for construction of street by which payments were to be postponed until betterments were assessed, brought more than six years after construction began, but before completion of work and before betterments were assessed, cannot be maintained although delay of city in work was not justifiable, see CONTRACT, 20.

### MANDAMUS.

1. The fact that the refusal of an officer to act is founded on a mistake of law does not preclude a writ of mandamus as a remedy to compel him to act. *Welch v. Swasey*, 364.

2. On a petition for a writ of mandamus addressed to the members of the board of appeal from the building commissioner of the city of Boston ordering the respondents to direct the building commissioner to grant to the petitioner a permit to erect a certain building to a height of one hundred and twenty feet, if the permit was refused on the ground that the height of the proposed structure would exceed the limit fixed by St. 1904, c. 833, and St. 1906, c. 383, and the orders of the commissioners thereunder, and the petitioner admits that if those statutes and the orders thereunder are constitutional his application for a building permit was refused rightly, the court has jurisdiction to dispose of the case on its merits, and the proceeding is a proper one to test the constitutionality of the statutes and the orders. *Ibid*.

Finding by single justice of this court on hearing of petition for writ of mandamus that allegations of petition were not proved will not be revised on appeal if no evidence is reported, see PRACTICE, CIVIL, 28.

Petition for writ of mandamus filed by veteran wrongfully removed from employment under civil service law and rules is not barred merely because brought two years and one month after such removal, see VETERAN, 1.

On petition for writ of mandamus to compel reinstatement of veteran alleged to have been ousted wrongfully from his employment under colorable abolition of office, questions of validity and waiver of notices, of laches, and of damages were considered, see VETERAN, 4-8.

Petition for writ of mandamus will lie to compel reinstatement of laborer employed by city under R. L. c. 19, §§ 23, 24, and civil service commissioners' rules if he is discharged wrongfully while there is work to be done of sort for which he was employed, although he has brought action of contract against city to recover wages due him since wrongful discharge, see VETERAN, 3.

## MARRIAGE AND DIVORCE

*Condonation.*

At a hearing on the objections of a wife to making absolute a decree *nisi* for a divorce obtained against her for cruel and abusive treatment, if the libellee shows that a child was born to her after the decree *nisi* was granted and that the date of its birth is consistent with its having been begotten by an act of intercourse which the libellee set up before the decree *nisi* as condonation on the part of her husband, the entire proceedings can be reviewed for the purpose of determining what shall be the final disposition of the case. *Koffman v. Koffman*, 593.

Finding of judge on objections of libellee to making absolute a decree *nisi* for divorce because of condonation by libellant through act of intercourse on certain day, that no intercourse took place at that time, does not affect legitimacy of child alleged by libellee to have been begotten by such act of intercourse, see LEGITIMACY.

## MASTER AND SERVANT.

See AGENCY.

## MILLS AND MILL PRIVILEGES.

Questions of reasonable use of waters of natural watercourse by one of several riparian owners, respective proprietors of mill privileges, where use is by night as well as by day, and reservoir is provided on tributary of stream to make flow at all times natural, see WATER RIGHTS, 1-4.

## MONOPOLY.

Opinion of justices as to constitutionality of proposed legislation restricting making of certain contracts for lease of patented machinery, see CONSTITUTIONAL LAW, 7-11.

## MORTGAGE.

Provisions of R. L. c. 12, §§ 16, 18, in regard to separate taxation of interests of mortgagor and mortgagee in real estate do not apply to mortgage by foreign corporation which covers real estate both in this Commonwealth and elsewhere, and machinery, equipment, patents, trademarks and franchises of corporation, see TAX, 3.

Where plaintiff's or demandant's case depends on proving breach of condition of mortgage by failure to make payments required by its terms, burden is on plaintiff or demandant to establish that payments were not made, see EVIDENCE, 5, 7; whether production of mortgage is even *prima facie* proof of such non-payment, *quære*, see EVIDENCE, 6.

If owner of land without consideration executes absolute deed in order that grantee may execute mortgage of it to secure money lent grantor, and has

deed recorded but retains possession of it, and grantee executes mortgage as requested, making of mortgage constitutes acceptance of deed and title passes to grantee without manual delivery of instrument, and grantor cannot maintain suit in equity to have deed cancelled except as to mortgage, see **DEED**; **EQUITY JURISDICTION**, 7.

## MUNICIPAL CORPORATIONS.

### *Officers and Agents.*

1. A janitor of a police station in Boston is not a police officer nor a member of the police department of that city, and the provision of St. 1878, c. 244, § 3, that officers or members of the police department may be removed by the board of police commissioners "for cause," creates no limitation on the power to remove such a janitor. The power of the police commissioners in this regard has not been abridged by St. 1885, c. 323. *Sims v. Police Commissioner*, 547.
2. St. 1885, c. 266, § 5, providing that the officers and boards of the city of Boston appointed under the amended charter of that city may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," does not apply to a removal made by the board of police commissioners, who are appointed by the Governor of the Commonwealth and are not officers or a board of the city of Boston. *Ibid.*

Building commissioner of city of Boston and members of board of appeal from his decisions are not judicial officers, see **BOSTON**.

School committee act as public officers in performance of their duties under R. L. c. 42, § 27, and not as agents of town, and are not bound by vote of town as to reopening school closed by them, see **SCHOOL AND SCHOOL COMMITTEE**, 1.

### *Liability for Street Improvements.*

Action of landowners against city on alleged contract to pay certain specified amounts as damages to plaintiffs for construction of street, by which payments were to be postponed until betterments were assessed, brought more than six years after construction began, but before completion of work and before betterments were assessed, cannot be maintained although delay of city in work was not justifiable, see **CONTRACT**, 20.

## NEGLIGENCE.

### *Due Care of Plaintiff.*

1. One who suddenly finds himself in a place of great peril and is obliged to act without time for reflection, when acting instantly or impulsively for self preservation, cannot be held to the same wisdom of choice as would be expected if he had time for deliberation, and, in the trial of an action brought by him for an injury caused by the alleged negligence of another, he may be found to have been in the exercise of due care, although his mistake of judgment resulted in the injury, if he was acting as a person

- of ordinary prudence might be expected to act in like circumstances. *Green v. Haverhill & Amesbury Street Railway*, 428.
- Of boy cleaning mules in cotton mill, see *post*, 23.
- Of boy dipping out dangerous acid in yard of jewelry factory, with small pitcher from which handle had been broken, see *post*, 22.
- Of boy of eighteen years working in laundry packing defective basket of extractor, see *post*, 20.
- Of experienced workman in wire factory injured by defect in wire drawing machine on which he had worked for fourteen years, see *post*, 17.
- Of employee in electric light works instantly killed, necessary for maintenance of action by widow against employer under R. L. c. 106, § 73, see *post*, 24.
- Of one driving blind horse across bridge having no railings or barriers at sides, see *post*, 64.
- Of one being driven in carriage as guest and acting with reasonable caution in entering and continuing in carriage where negligence of driver contributed to injury, see *post*, 2, 3.
- Of civil engineer employed by metropolitan water and sewerage commissioners present at work growing out of construction of Wachusett reservoir and injured by negligence of employee of contractor, see *post*, 5.
- Of one entering crowded subway to take electric car, see *post*, 30.
- Of old man feeble on his legs boarding car and falling as it started, see *post*, 36.
- Of woman entering open electric car who put two year old boy into seat ahead and stepped on running board to have boy "push over," see *post*, 25, 26.
- Of passenger on open electric car passing along running board from rear platform to seat by friend and struck by projecting trolley pole, see *post*, 33-35.
- Of intoxicated passenger left by conductor and brakeman of railroad train in perilous position on steps of station, see *post*, 60.
- Of passenger in combination car of railroad train leaving seat and standing leaning against side of baggage car talking to baggageman when injured by train coming into collision with another train, see *post*, 57.
- Of passenger on railroad train standing near open door of car when he knew train was about to pass over bridge that was undergoing repairs, see *post*, 58.
- Of boy of eight years crossing street where he knew that electric cars ran frequently, see *post*, 43.
- Of one seventy years of age crossing at night street where electric cars ran, see *post*, 46.
- Of driver of heavy covered wagon crossing street car track diagonally and struck by car approaching from rear, see *post* 52, 53.
- Of one who, while crossing double tracks of street railway where line of cars on nearer track obstructs view of farther track, goes upon farther track without looking or listening, see *post*, 44.
- Of boy eleven years old crossing electric car tracks in street on way to school injured by car approaching on farther track and hidden by car on nearer track, see *post*, 41.

*Negligence (continued).*

- Of one seventy-two years old with defective hearing driving upon street car tracks from private way at right angles therewith where view of track was almost entirely cut off and, when seeing car, committing error of judgment in whipping up his horse, see *ante*, 1; *post*, 51.
- Of driver of milk wagon approaching from intersecting street and attempting to cross street on which electric cars ran, see *post*, 49.
- Of driver of heavy express wagon ten feet long backing up to house and swinging horse upon street car tracks in late afternoon of day in December, looking and listening and neither seeing nor hearing car, see *post*, 54.
- Of driver of horse attached to grocer's wagon in leaving horse standing unhitched and unattended on street along which electric cars ran, see *post*, 47.
- Of one working for city in macadamizing streets near street railway tracks and looking and listening for cars, see *post*, 46.

*Imputed.*

2. If one, while being driven in a carriage as a guest of the person driving, is injured by a collision on a public way caused directly by the negligence of a third person, to which negligence on the part of the driver contributed, he may recover against the negligent third person in spite of the negligence of the driver if personally he was in the exercise of all the care which ordinary caution requires. *Skultz v. Old Colony Street Railway*, 309.
3. If one has accepted an invitation of a friend to be driven by him in his carriage and in entering the vehicle and continuing in it has acted with reasonable caution, having no ground to suspect incompetency or to anticipate negligence on the part of the driver, and while so being driven is injured by a collision on a public way caused directly by the negligence of a third person, which would not have happened unless the driver also had been negligent, and if the impending danger was so sudden or of such a character as not to require or permit any act for his own protection, the guest may recover from the negligent third person for his injuries. *Ibid*.

*Of Person in Charge of Child.*

4. It is not as matter of law negligence on the part of a woman in charge of her grandchild one year and nine months old to take the child with her in going to the clothes line in a good sized door yard to see if a few things she needs are dry and temporarily to leave him inside the gate of the yard which usually is open from whence he goes into the street and is run into and knocked over by a wagon. *Norris v. Anthony*, 225.

*Licensee or Volunteer.*

5. If a civil engineer employed by the metropolitan water and sewerage commissioners, who is in charge of the work growing out of the construction of the Wachusett reservoir and whose duty it is to inspect all the work as it progresses, in the course of the performance of his duties is present, sitting with a masonry inspector on a derrick boom lying near and instructing the inspector in regard to the way in which his work is to

be done, while the servants of one who has a contract with the Commonwealth for the construction of a masonry arch bridge over the Nashua River are engaged in erecting a derrick as a preliminary to the construction of the arch, and owing to the negligence of the servants of the contractor is struck and injured by the foot of the mast of the derrick swinging out as it is being hoisted into place, in an action against the contractor for his injuries, it cannot be ruled as matter of law that he was a mere volunteer or licensee or that he was not in the exercise of due care or assumed the risk of such an accident. *Pickwick v. McCauliff*, 70.

### *Trespasser.*

Boy playing on freight cars of railroad train held a trespasser and evidence held not to support contention that he was injured through wanton conduct on part of railroad company's employees, *see post*, 55.

### *Intoxicated Person.*

6. One, who suffers injuries while so intoxicated as to be incapable of standing or walking or taking care of himself in any way, may maintain an action against a person whose negligence in view of his manifest condition was the direct and proximate cause of his injuries. *Black v. New York, New Haven, & Hartford Railroad*, 448.

Duty of employees of railroad company toward intoxicated person and liability of company toward such person helped from train by employees of company and left in perilous position, *see post*, 59, 60.

### *Assumption of Risk.*

Assumption of risks of employment by employee, *see post*, 7, 8, 22.

Tenant does not assume risk of injury due to hidden defects in outside steps of house which existed at time of letting, but only of obvious defects, *see LANDLORD AND TENANT*, 3.

Whether one entering subway to become passenger upon electric car at hour when she knew that crowded condition was usual assumed risk of injury by reason of crowd, *see post*, 80.

Civil engineer employed by metropolitan water and sewerage commissioners present at and in charge of work growing out of construction of Wachusett reservoir held not to have assumed risk of injury caused by negligent handling of mast of derrick being erected by employees of one doing work under contract with Commonwealth, *see ante*, 5.

Whether employee of street railway company, who with other employees had been transported free on company's lines for number of years but within two or three years had had pass thrown out to him annually with pay envelope, nothing being said and terms of pass stating that employee using it assumed all risk of accidents while doing so, can recover for injuries occurring through company's negligence while he was on company's car using pass and not on company's business, *see CARRIER*, 3, 4.

*Employer's Liability.*

## Assumption of risk by employee.

7. Under the provisions of the employers' liability act a workman by his contract of employment does not assume the risk of an accident caused by the negligence of a superintendent of his employer. *Baggeski v. Lyman Mills*, 108.
  8. A woman, who is employed by a telephone company as a toll operator at its telephone exchange in a city, assumes the ordinary risks of nervous annoyance and irritation reasonably connected with the performance of her duties, but does not assume the risk of a shock from an electric current which produces bodily prostration. *Cahill v. New England Telephone & Telegraph Co.* 415.
- Boy working in jewelry manufactory held not to have assumed risk of injury from acid splashing into his eyes when pitcher with broken handle with which in scope of his employment he was dipping out acid slipped because of slippery nature of acid, see *post*, 22.

## Superintendence.

9. If a superintendent in charge of a room in a cotton mill, having reason to know that a boy fifteen years of age is or may be at work back of a mule cleaning its weights and that the boy is justified in thinking that the mule has been stopped for the purpose of being cleaned, sends a workman to repair the mule without taking any steps to ascertain where the boy is and if necessary to give him notice in time to save himself when the mule is moved, and the workman in proceeding to make the repairs sets the carriage of the mule in motion and injures the boy, in an action by the boy against his employer for his injuries there is evidence of negligence on the part of the superintendent. *Baggeski v. Lyman Mills*, 108.
10. In an action against a street railway company by a workman, who was employed by the defendant as one of a gang of laborers to work under one P. in unloading a coal schooner at a power station wharf of the defendant, for injuries from falling into the hold of the vessel owing to the giving way and breaking of a ladder about twenty feet long which the plaintiff with one or more of the other men was ascending when they had been ordered to stop work for the day, it appeared that the ladder was put in position and was lashed by P., and there was evidence warranting a finding that the giving way of the ladder was caused by his negligence in selecting an improper piece of rope with which to lash the top of the ladder to a ring bolt in the deck. There also was evidence that P. was paid more than the other men employed in unloading the schooner, that he did manual work only when he felt like it, that it was his duty to report how many men he wanted and to report them if they did not work properly, and it also was his duty to tell the men where to shovel the coal, to whistle and tell the engineer when to hoist and when to lower the coal scoop, and to tell the men when to stop work, and that there was no

other person in immediate charge of the work. *Held*, that this evidence warranted a finding that P. was a superintendent within the meaning of the employers' liability act, and that the setting up of the ladder, including the lashing of it, was a part of the work to be done under his superintendence. *Hourigan v. Boston Elevated Railway*, 495.

Of person in charge of train.

11. In an action against a railroad company by the widow of a train checker who was employed in a freight yard of the defendant for causing the death of the plaintiff's husband, who was killed instantly by three cars that were kicked down upon the track where he was at work, it could be found that the plaintiff's husband after dark in the performance of his duty was standing with a lantern on his arm on the middle track at a crossing, taking down with a pad and pencil the numbers of the cars on a train that was moving slowly past him, when the cars that struck and killed him came upon him without any warning or light and without any brakeman upon them. There was evidence tending to show that when cars were kicked down on a track in the yard it was customary to have a brakeman upon them, with a lantern if it was at night, to warn the checkers who were taking the numbers, and that such warnings usually were given. There also was evidence tending to show that cars sometimes were kicked down without any brakeman or light upon them, some witnesses testifying that this happened several times a day or night and others testifying that it did not occur very often, but it could have been found that if this was done it was contrary to the rules and that the person doing it was liable to a reprimand. *Held*, that the case properly was submitted to the jury, who were warranted in finding that the plaintiff's husband was in the exercise of due care and that his death was due to negligence on the part of the conductor in charge of the three cars in sending them down without a brakeman or a light upon them to warn the checkers. *Meadowcroft v. New York, New Haven, & Hartford Railroad*, 249.

Ways, works or machinery.

12. In an action by a workman in a factory for making bridge materials against his employer under R. L. c. 106, § 71, cl. 1, for personal injuries from a defect in the ways, works or machinery of the defendant, there was evidence that the plaintiff was injured from being struck by heavy iron trusses which fell owing to the breaking of the chain by which they were being hoisted, that the link which broke was crystallized by reason of constant use, that the existence of crystallization cannot be determined on inspection even by an expert but that it can be prevented by annealing, and that chains in constant use should be annealed every six months to prevent crystallization, that the chain which broke was lying on the floor and was used generally every day and was put around the trusses by a fellow workman of the plaintiff, that there were ten or twelve larger chains about the shop where the plaintiff and his fellow workman were at work, that if the chain used had had its apparent strength it would have been more than sufficient to bear the weight of the trusses but that owing to



*Negligence (continued).*

the crystallization of the link that broke it did not have one half of its apparent strength. *Held*, that the evidence warranted a finding that the furnishing of such a chain among others for use by the plaintiff was negligence on the part of the defendant, and that the fact that the defendant furnished a number of stronger chains did not help its case. *Ford v. Eastern Bridge & Structural Co.* 89.

Actions by employees against employers for injuries received because of defective or dangerous machinery or appliances, see *post*, 18-22; and because of dangerous place to work, see *post*, 23.

Defective or dangerous machinery or appliances.

18. In an action by a workman against his employer for personal injuries alleged to have been caused by the failure of the defendant to provide safe appliances for the plaintiff's use, the plaintiff is not required to show the particular cause of the accident, and is entitled to go to the jury upon evidence of defects in the construction of the defendant's appliances which together with the happening of the accident would justify the jury in inferring that the plaintiff's injuries were due to the negligence of the defendant. *Erickson v. American Steel & Wire Co.* 119.
14. In an action by a workman in a factory against his employer for personal injuries from the bursting of a cast-iron header or section of steam pipe connected with a boiler and which with other similar sections of pipe, each connected with a separate boiler, formed bolted together a continuous line of pipe constituting the steam main of the defendant's power plant, it appeared that, although the defendant purchased the headers at a reputable foundry where they were tested, the machine work upon the castings was done at the defendant's shop and the steam main was put together and put in place with its connections to the boilers by the defendant's employees and according to a design both as to construction and connections made by the defendant's engineer, that the work during construction was examined by a competent inspector, that the defendant applied to the headers and the steam main the usual tests before the plant was used and made the customary inspection while the plant was in operation. There was evidence from competent experts that the construction of the plant was not proper mechanically, because sufficient arrangements were not provided for the expansion of the steam main, the want of which would have a tendency to weaken the joints throughout the length of the pipe, and because no drip cocks were provided as they should have been along the line of the pipe, and also because cast iron was an unsuitable material of which to make the headers on account of its brittleness and rigidity and because the method of connecting the feed pipes from the boilers to the main pipe was improper. *Held*, that the fact that the defendant purchased the headers from a reputable manufacturer was no defence, even assuming that, because the material was in common although not exclusive use, the use of cast iron headers was not negligence, for the castings after their purchase were finished by the defendant and incorporated into a structure according to the design of the defendant's engineer, the faulty character of which could have caused the break if the castings had had

no hidden defect; and that the evidence of competent inspection, although it tended to show that the defendant took all the precaution which ordinary prudence required, was not a defence to its liability for a failure to use due care in providing safe appliances for its workmen; that the plaintiff was not required to show the particular cause of the accident, it being sufficient for him to produce evidence of defects in the construction of the steam main which with the evidence of its breaking would warrant the inference by the jury that the accident was due to the negligence of the defendant; and that the case properly was submitted to the jury. *Erickson v. American Steel & Wire Co.* 119.

15. In an action by a painter against a contractor employing him, for personal injuries from a fall caused by the breaking of a ladder used as a staging, it is not evidence of negligence on the part of the defendant, that the defendant's superintendent in charge of the work left the plaintiff and two of his fellow workmen, of an average weight of one hundred and sixty pounds each, to paint a house using as a staging an extension ladder, which was safe for such use when not extended, without telling the plaintiff, who was a painter of twenty years' experience and was conversant with the use of extension ladders as stagings, that it would be dangerous to extend the ladder so as to make it six feet longer if all three of the men were to use it as a staging at the same time. *Jacobson v. Favor*, 85.
16. In an action by a painter against a contractor employing him, for personal injuries from a fall caused by the breaking of an extension ladder used as a staging, where it appeared that the accident would not have happened if the ladder had not been extended when used as a staging by three heavy men at the same time, the plaintiff had testified "We had used this ladder painting on other jobs in this same way," and his counsel argued that from this statement the jury could have inferred that the same three men had used the ladder extended and that this was known by the defendant. *Held*, that from the statement as an isolated piece of evidence the jury would not be warranted in drawing those inferences; and moreover an examination of the evidence showed that the statement referred merely to the use of the ladder as a staging and not to its use as such a staging by three heavy men when it had been drawn out. *Ibid*.
17. In an action by an experienced workman in a wire factory against his employer, for personal injuries from the breaking of a bolt of a wire drawing machine on which he had worked for fourteen years previous to the accident the plaintiff testified that when rolling wire with the machine the wire sometimes would get twisted, and that when a kink came he had to step on the treadle of the machine to stop it, that, if the machine was not stopped and the kink got as far as the die it was likely to injure the die so that repairs would be necessary, that on the day in question while he was working the machine he saw a kink coming toward the die, that he stepped on the treadle with one foot to stop the machine and, the treadle not going down, then got on with both feet, using all the strength he possessed to put down the treadle, but that the bolt which attached the treadle to the leaders broke and he came down on both heels on the floor, sustaining the injuries sued for. There was no evidence as to when the

## Negligence (continued).

- bolt was put in the machine or whether it ever had been inspected, and there was evidence that there was an old flaw at the point of breakage, one part of the break looking fresh and another part rusty. There was conflicting evidence as to whether the flaw or rusty part was visible on the surface of the bolt before the break. *Held*, that the questions of the due care of the plaintiff and of the negligence of the defendant were for the jury. *Hannan v. American Steel & Wire Co.* 127.
18. In an action by a telephone operator against her employer for personal injuries from a severe shock of electricity, if the plaintiff introduces evidence of a defect in the apparatus of which the defendant knew or in the exercise of due diligence ought to have known, so that it might be found that the shock was caused either by a want of repair or a lack of proper adjustment of the different parts, the question of the defendant's negligence is for the jury. *Cahill v. New England Telephone & Telegraph Co.* 415.
19. In an action at common law by a telephone operator against her employer for personal injuries from a severe shock of electricity, there was evidence that the plaintiff was employed as a toll operator at the defendant's telephone exchange in a city, that on the night before and during the morning of the day of the accident the plaintiff had reported to the chief operator that while at work at a certain switchboard she had received at times sensations not before noticed, although she previously had used this switchboard a part of every day for at least a week, and that these sensations, while not producing a shock, caused a "jarring and a grinding or rumbling in the ear" which at times caused her head to ache, that at the time of the accident she was sitting in front of this switchboard attending to calls, that, upon receiving a call in which she heard the subscriber state the place with which he wished to be connected, there followed a sensation of "shocking and grinding" and then her head began to ache, her side hurt her, her arms "kind of tightening," and she partly lost consciousness. There also was evidence that for some time before the accident there had been complaints from the plaintiff and other employees to the persons in charge that this switchboard, or the system controlling the electric current, was not working properly, and that the persons in charge had made attempts to find out and remedy the difficulty. *Held*, that the jury could have found that the accident was of such a nature that it could not have occurred unless the defendant had permitted the apparatus to become defective, and that the question of the defendant's negligence was for the jury; *also*, that the question, whether the plaintiff by continuing to use the switchboard, after she had reason to apprehend that something was wrong in the mechanism and had reported the previous disturbances to those who had been placed in charge by the defendant, assumed the risk of any subsequent injury, was for the jury. *Ibid.*
20. In an action by a boy eighteen years of age employed in a laundry against his employer, for personal injuries from being hit by a piece of the rim of the revolving basket of an extractor which broke immediately after the plaintiff had started the machine, it appeared that the plaintiff

had been working on the machine for nineteen days when the accident occurred, that he started the machine in the way in which he had been instructed to start it, and followed his instructions in other matters except possibly in the matter of packing the basket. The evidence of the plaintiff tended to show that the basket was packed properly while that of the defendant tended to show that it was overloaded and that this was the cause of the accident. *Held*, that the question whether the plaintiff was in the exercise of due care in packing the basket as he did and in failing to discover a defect in the machine, if it existed, was for the jury. *McGuinness v. Lehan*, 241.

21. In an action by a boy eighteen years of age employed in a laundry against his employer, for personal injuries from being hit by a piece of the rim of the revolving basket of an extractor which broke immediately after the plaintiff had started the machine, it appeared that the extractor had an outer shell of cast iron, within which and of the same shape, with a space of three and a quarter inches between, was the revolving basket into which clothes were put to be dried, that it was expected that when the power was applied and the basket began to revolve it would vibrate more or less, but that after a few revolutions it would cease to vibrate and revolve steadily, and that it was not expected or intended that the basket would "bang" against the shell. There was evidence tending to show that the basket had "banged" against the shell before the accident causing the rim to strike the shell and break, that this "banging" was due to the machine being out of order, and that the defendant knew of it or might by the exercise of reasonable care have known of it, that after the accident the basket was lying against the shell and that this ought not to have happened if the machine had been in order, also that the machine had been repaired before the accident and that in making the repairs one of the discs, which formed a part of the conical bearing for the vertical shaft on which the basket rested, had been left out. *Held*, that there was evidence for the jury of negligence on the part of the defendant. *Ibid*.
22. In an action by a boy employed by a manufacturer of jewelry against his employer for personal injuries, there was evidence that the plaintiff was about nineteen years of age and was not of average intelligence, that he was sent by one H. in the employ of the defendant to fetch some liquid called "dip" from a large crock standing in the yard of the factory, that the liquid was composed of oil of vitriol, nitric acid and muriatic acid, that it was heavier than water and made slippery everything dipped into it, that the plaintiff did not know what the mixture was composed of or contained and was not instructed by any one as to its dangerous character or told to look out for it, that he was given a pitcher which would hold about half a gallon and also a little pitcher from which the handle had been broken off, and was told to "take this pitcher and go down and get dip; and take that little pitcher beside it and put it in this pitcher," that he went down and set the larger pitcher on the ground beside the crock and took up the little pitcher and dipped it in the crock until it was pretty nearly full, that as he was "bringing it up" it was heavy and slipped out of his hand, and the liquid splashed into his face and eyes causing the

*Negligence (continued).*

injuries sued for, that it had become a part of the plaintiff's duty to do errands, that the foreman in the department, where the plaintiff worked as a scratcher of silver and on a foot press, had told the plaintiff to do as H. wanted him to and on two occasions before the accident had directed H. to ask the plaintiff to go or himself had sent the plaintiff with H. when H. went to the yard for dip, but that the plaintiff on these occasions had had nothing to do with bailing out the dip and that H. did not tell him about it or give him any instructions. *Held*, that there was evidence that the plaintiff did not assume the risk of the accident, evidence of due care on the part of the plaintiff, and evidence of negligence on the part of the defendant in failing to instruct the plaintiff properly and in providing him with a pitcher without a handle to dip the mixture from the crock; *also*, that there was evidence that the plaintiff at the time of the accident was acting within the scope of his employment. *Hodde v. Attleboro Manuf. Co.* 237.

Action by employee against employer for injuries received because of breaking of hoisting chain due to crystallization which could have been prevented by periodical annealing, *see ante*, 12.

## Dangerous place to work.

23. If a boy fifteen years of age employed as a back boy in a cotton mill, whose duty it is to clean certain mules when stopped for the purpose, while proceeding to clean a mule which he is justified in believing has been stopped for the purpose of being cleaned, and having no reason to think that repairs are to be made upon the mule while he is cleaning it, is injured by the carriage of the mule being moved for such repairs, in an action against the proprietor of the mill for his injuries he can be found to have been in the exercise of due care. *Baggeski v. Lyman Mills*, 103.

## Failure to instruct.

Boy injured in yard of jewelry factory by splashing of acid into his eyes while dipping it out with small pitcher from which handle had been broken, within scope of his employment, allowed to recover from employer because of lack of proper instructions, *see ante*, 22.

## Causing death.

24. To sustain an action under R. L. c. 106, § 73, by the widow of an employee against his employer for causing the instantaneous death of her husband, the plaintiff must show affirmatively that her husband at the time of the accident causing his death was in the exercise of due care, and if there is an entire absence of evidence as to what he was doing when the accident happened a verdict must be ordered for the defendant. *McCarty v. Clinton Gas Light Co.* 76.

Railroad company held liable for death of train checker in its freight yard killed by reason of person in charge of train causing cars to be kicked down track at night without light upon them and with no one in charge of them, *see ante*, 11.

*Street Railway.*

## Person attempting to enter car.

25. When a woman having in charge a child two years of age is attempting to board an open electric car it is the duty of the conductor to ascertain whether she has got into such a position as to make it safe to start the car before he gives the signal for starting, especially if the car is at the beginning of a curve where there is likely to be more than the ordinary jar and sway as it starts. *Hamilton v. Boston & Northern Street Railway*, 324.

26. In an action against a street railway company for personal injuries, a strong, healthy woman about thirty-five years of age having with her a little boy two years old may be found to have been in the exercise of due care when attempting to board an open electric car of the defendant, if she lifted the little boy to the floor of the car, from which he climbed upon a seat, and she then stepped on the running board and said to the child "push over," in order to make room for herself at the outside end of the seat, leaning toward the child to help him over, and had her arms extended in front of her for this purpose when the car started with a sudden jerk, and she was injured. *Ibid.*

27. In an action against a street railway company for personal injuries from the alleged negligent starting of an open electric car of the defendant as the plaintiff was attempting to board it, the jury returned a verdict for the defendant, and the plaintiff excepted to the exclusion of the question asked the defendant's conductor on cross-examination "If it was not a common occurrence for the cars to be slowed down for the purpose of allowing intending passengers to board the cars while the cars were moving at a slow rate of speed, and if that was not customary?" It appeared from the uncontradicted testimony at the trial that the car came to a full stop for the purpose of discharging and receiving passengers before the plaintiff attempted to get on it. The plaintiff did not testify that he knew of any such custom as that referred to in the question, or that he supposed the car to be in motion or found it to be moving when he stepped upon it. *Held*, that proof of a custom not to stop cars on other occasions had no bearing on the question whether this car started suddenly after being stopped, and would not have shown an implied invitation to board the car while in motion because no such invitation ever reached the plaintiff or was acted upon by him, and therefore that the evidence excluded was irrelevant and immaterial. *Greer v. Union Street Railway*, 246.

## Person entering car in subway station.

28. In the trial of an action against a street railway company for personal injuries incurred while entering as a passenger a car of the defendant at a station in a subway through which the defendant had a right to operate its cars by permission of the lessee of the subway, if it appears that the injuries to the plaintiff were due to the surging and struggling of the crowd at an hour when a crowded condition of the station was usual, it is a question for the jury, whether, in carrying on the defendant's business

*Negligence (continued).*

the crowding of the station platforms and cars at certain hours of the day was unavoidable, the high degree of care which it was bound to exercise toward its passengers did not require as a reasonable precaution the employment of an increased number of men to prevent such jostling and crowding at the entrance of the cars as involved danger to passengers.

*Kuklen v. Boston & Northern Street Railway*, 341.

29. In an action by a woman against a street railway company for personal injuries incurred while entering as a passenger a car of the defendant at a station in a subway through which the defendant had a right to operate its cars by permission of the lessee of the subway, if it appears that the injuries of the plaintiff were due to the surging and struggling of the crowd in attempting to get on the car, and there is evidence that at the time of day when the accident occurred there usually was a large crowd in this subway station, and that on many previous occasions there had been the same surging and struggling to get upon the cars as occurred at this time, the jury are justified in finding that the defendant and its servants ought to have anticipated what actually took place and in the exercise of necessary care ought to have taken precautions to give the plaintiff the degree of protection to which she was entitled. *Ibid.*

30. At the trial of an action by a woman against a street railway company for personal injuries incurred in entering as a passenger a car of the defendant at a station in a subway through which the defendant had a right to operate its cars by permission of the lessee of the subway, if it appears that the injuries of the plaintiff were due to the surging and struggling of the crowd at an hour when a crowded condition of the station was usual, and if it further appears that the plaintiff had been in similar crowds at the same station before, had seen the same pushing and struggling and the same failure of the defendant to control the assemblage, and on former occasions had escaped injury so narrowly that in testifying she said "Many a night I have almost got killed," this is evidence to be considered by the jury in passing upon the questions whether the plaintiff was in the exercise of due care and whether she assumed the risk of such an accident as happened to her, but the fact that with the knowledge gained by her experience she joined the general rush to get into the car is not conclusive against her as matter of law upon either of these issues. *Ibid.*

*Injury to person in car.*

31. Whether a street railway company which sees fit to use as a motive power a force so imperfectly understood as electricity might not be liable for an injury to a passenger caused by a flash from the controller of a car although the flash could not have been prevented by any means that yet have been devised or by any care that could be exercised, *quaere*. *Gilmore v. Milford & Uxbridge Street Railway*, 44.

32. In an action against a street railway company for personal injuries from being struck by the elbow of a fellow passenger who was pushed and fell upon the plaintiff by reason of a burst of flame from the controller of an electric car of the defendant on which the plaintiff was a passenger, there was evidence that the flame illuminated the whole vestibule of the car and

all the vicinity, that it seemed as though the whole front vestibule of the car was on fire, that the coat of a passenger who stood in the vestibule with the motorman was struck by the flame and its wearer could see a very slight mark on it the next morning, that there was dense smoke which affected the sight of this passenger until the next day, that the flame was a continuous one "with equal force" and lasted a quarter of a minute or more, that when the door into the front vestibule was opened a volume of smoke came into the car, that the plaintiff all at once heard a noise and turned and looked and the front vestibule seemed to be all ablaze, that when the door was opened the flame seemed brighter, that the plaintiff could see it as high as the door, and that a dense smoke and a stifling smell came into the car. *Held*, that there was evidence warranting a finding that the flame was not the instantaneous and harmless flame which results from a flash from a controller when in proper condition, but was attended by unusual results which would not have occurred if the controller had been in proper condition and that if proper care had been exercised there would have been no such flame, and that the plaintiff was entitled to go to the jury. *Gilmore v. Milford & Uzbridge Street Railway*, 44.

83. In an action for personal injuries by a passenger against a street railway company operating cars on a road equipped by it with trolley poles, it is evidence of negligence on the part of the defendant that one of the poles is maintained upon a curve of its track at such an inclination toward the track that a passenger on the running board of an open car passing around the curve is in danger of coming in collision with it. *Pomeroy v. Boston & Northern Street Railway*, 507.
84. In an action against a street railway company for personal injuries from coming in contact with a trolley pole alleged to have been placed and maintained negligently by the defendant so near its track as to endanger passengers travelling upon its cars, the fact that the plaintiff before the accident was familiar with the place and knew the location of the poles, although important evidence on the question of his due care, is not conclusive upon the question whether he was negligent in leaving the back platform of an open car and stepping upon the running board in order to go to a seat, and thus coming in collision with a pole inclining too much toward the track. *Ibid*.
85. In an action against a street railway company for personal injuries from coming in contact with a trolley pole alleged to have been placed and maintained negligently by the defendant so near its track as to endanger passengers travelling upon its cars, if there is evidence that the plaintiff, who was familiar with the locality, upon boarding an open car of the defendant, and seeing no vacant seat, took a position on the rear platform, when an acquaintance, who was seated, told him that room had been made for him, and he started to pass along the running board for the purpose of reaching the seat and was struck by the pole, the question whether the plaintiff was in the exercise of due care is for the jury. *Ibid*.
86. In an action at common law by an executrix against a street railway company for suffering of the plaintiff's testator alleged to have been caused



*Negligence (continued).*

by injuries received while a passenger on a car of the defendant, there was evidence that the plaintiff's testator was an old man and feeble on his legs, that two days before his death he boarded a car of the defendant which "started suddenly and threw him his length and he put his hand in a woman's handbox up to his elbow," that the next day he went to his work and the day after, which was Sunday, went to church, and that when he went to bed on Sunday night he had a paralytic shock from which he died. There was medical testimony to show that the shock might have been caused by such an accident. No further explanation of the accident appeared. *Held*, that there was no evidence for the jury that the plaintiff's testator was in the exercise of due care or that the defendant was negligent, the manner in which the accident happened being left to conjecture. *Jameson v. Boston Elevated Railway*, 560.

37. A street railway company is not liable for an injury to a passenger incurred while travelling in one of its open cars on the Fourth of July from being struck by the wadding of a cannon fired with a blank cartridge by a patriotic citizen in celebration of the day in the door yard of his house adjoining the street on which the car was passing, although the citizen had been firing the cannon practically all day as often as it could be loaded and several hundred cars of the defendant had passed while he was doing so, and the superintendent who had charge and control of the operation of the railway on that day had noticed for many years that in the city where the accident occurred there was a great deal of discharging of firearms on every Fourth of July. *Ormandroyd v. Fitchburg & Leominster Street Railway*, 130.

Whether employee of street railway company, who with other employees had been transported free on company's lines for number of years but within two or three years had had thrown out to him annually pass with his pay envelope, nothing being said and terms of pass stating that employee using it assumed all risk of accidents while doing so, can recover for injuries occurring through company's negligence while he was on company's car using pass and not on company's business, see CARRIER, 3, 4.

Person alighting from car.

38. In an action by a woman passenger against a street railway company for personal injuries from a fall caused by the plaintiff's dress catching on something as she was alighting from the front platform of a car of the defendant, if there is nothing to show on what the plaintiff's dress caught or why it caught there, and the accident is not explained further, the plaintiff has failed to sustain the burden which rests on her, and a verdict must be ordered for the defendant. *Thomas v. Boston Elevated Railway*, 438.
39. In an action by a woman passenger against a street railway company for personal injuries, the facts that, while the plaintiff was alighting from the front platform of a somewhat crowded car of the defendant, her dress caught, causing her to fall, that there were four other persons on the platform besides the motorman, and that the plaintiff was caught so firmly that some one pulled her toward the car to loosen her dress, do not war-

rant the inference that the plaintiff's dress was caught by something securely attached to the car, or that, if it was, the vestibule was defective, both of these conclusions being mere conjectures. *Thomas v. Boston Elevated Railway*, 438.

40. It is not the duty of the conductor of a street car, which has stopped on a street of a country town for passengers to alight, to warn a woman passenger about to step from the car that there is a gutter between the car and the sidewalk in the form of a ditch about one foot wide and about one foot deep, and, if the passenger in alighting steps into the gutter and is injured, in an action brought by her against the railway company operating the car for her injuries, the failure of the conductor to warn her of the existence of the gutter is not evidence of negligence on the part of the company. *Thompson v. Gardner, Westminster & Fitchburg Street Railway*, 133.

Person walking in street and crossing tracks.

41. If a boy eleven years of age on his way to school has occasion to cross a city street with parallel tracks on which he knows that electric cars run in both directions, and, seeing a car on the track nearer to him, waits for it to pass and then runs at a trot across the track behind this car, when he is struck and injured by a car coming from the opposite direction on the track beyond, which was concealed from his view by the first car, he is not in the exercise of due care, and cannot recover for his injuries from the corporation operating the car which struck him even if such operation was negligent. *Stackpole v. Boston Elevated Railway*, 562.
42. In an action against a street railway company by a boy eight years of age when injured, for personal injuries from being run into by a car of the defendant while crossing a highway, if it appears that a rule of the defendant required the gong to be rung at all street crossings and at all points where vehicles or foot passengers were crossing or ordinarily would be likely to cross the tracks, and that this signal was not given by the motorman and had it been given would have prevented the accident, and if there also is evidence from which it could be found that the motorman failed to observe the plaintiff who was in front of the car near the middle of the track, and that had he used reasonable diligence he would have seen him and could have prevented the accident by applying at once the emergency brake, there is evidence to go to the jury of negligence on the part of the defendant. *Burns v. Worcester Consolidated Street Railway*, 63.
43. In an action against a street railway company by a boy eight years of age when injured, for personal injuries from being run into by a car of the defendant while crossing a highway, there was evidence that the plaintiff to reach his destination was obliged to cross the street in question on which were tracks of the defendant where cars frequently were passing, and that the plaintiff with knowledge of these conditions, seeing a car slowly moving past, waited between the sidewalk and this car until it had passed, and then, after listening and not hearing a bell, which he had observed always was rung when a car passed this point, and, seeing no car except at some distance to the south, started to cross over, that, upon reaching the middle of the track used by cars going north, he saw a car

Negligence (*continued*).

coming, and, jumping back to avoid it, was struck by the under side of the running board and thrown under the wheels of the rear truck. It also could have been found that other travellers were passing over the street at the time that the plaintiff attempted to cross. *Held*, that there was evidence for the jury that the plaintiff was in the exercise of the degree of care which under like conditions would be exercised by an ordinarily prudent child of his age. *Burns v. Worcester Consolidated Street Railway*, 68.

44. If a man of middle age starting on foot to cross a street, where he knows that there are parallel street railway tracks over which cars pass frequently, sees before him on the nearer track a line of stationary cars which obstruct his view of the track beyond, and walking over the first track on a cross walk between two of the cars standing still about three feet apart and being startled by hearing a bell or two bells ring on one of them, hurries to the middle of the farther track without first looking or listening and is struck by a moving car and is injured, he is not in the exercise of due care. *Blackwell v. Old Colony Street Railway*, 222.

## Causing death of traveller on street.

45. In an action against a street railway company under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate, it appeared that the intestate was nearly seventy years of age, that at about half after ten o'clock in the evening he was seen standing at a corner of the street where the accident happened looking up and down the street, and next was seen going over the cross walk which led across the tracks, that he had crossed one track and had reached the other when he was struck and killed by a car of the defendant. It was undisputed that at the corner where the accident occurred the number of travellers with teams at that time in the evening was so great as to require close observation to ascertain which way they were going. There was conflicting testimony on which it could have been found that the street was well lighted by an electric arc light and that on coming within one hundred and fifty feet of the place of the accident the motorman saw the intestate standing on the curbing at the corner and did not see him again until he was in front of the car, that the gong was not rung, that the rate of speed was at least ten miles an hour, and that if the motorman, instead of concentrating his attention upon the volume of public travel on the side of the street where the plaintiff's intestate was, had included in his general observation the entire area from curb to curb, and also had rung the gong seasonably, the accident might have been avoided. *Held*, that, assuming without deciding it, that there was evidence for the jury of due care on the part of the plaintiff's intestate, there was no evidence of negligence on the part of the defendant in employing or retaining the motorman as a servant, in the absence of proof of previous misconduct showing unfitness; and that, even if the acts and omissions of the motorman would have been evidence of negligence on his part in an action brought by the intestate had he survived, they were not evidence of gross negligence of a servant of the defendant within the meaning of the statute. *Moran v. Milford & Uxbridge Street Railway*, 52.

## Person working in street near tracks.

46. In an action against a street railway company for personal injuries from being struck by an electric car of the defendant while the plaintiff was at work in the employ of the city where the accident occurred, assisting in macadamizing a street of that city, the plaintiff testified that when struck by the car he was working at a distance of two feet from the tracks, that two or three seconds before the accident he had looked for a car coming and saw none although the track was visible for twelve hundred feet, that he was listening for the noise of an approaching car but heard none, and that no bell or gong was sounded. Other witnesses testified that the plaintiff apparently was in a safe place, and that they heard no car coming. There was evidence for the defendant on which it could have been found that just before the plaintiff was hit he changed his position by stepping nearer to the car and that if he either had looked or had listened he would have seen or heard the car coming. *Held*, that the question of the plaintiff's due care was one for the jury. *O'Leary v. Haverhill & Plaistow Street Railway*, 339.

## Unattended horse and wagon on street.

47. If a horse attached to a grocer's wagon is slow and of a quiet disposition and not afraid of electric cars and has been used for four or five months in delivering groceries from house to house without being hitched by a weight or otherwise when left by his driver and never has started without his driver, and if the driver leaves this horse standing unhitched on a street, along one side of which electric cars run, in front of a house at which the horse has been accustomed to stand while groceries were being delivered and goes into the house to deliver groceries, and if after being absent only a minute he returns and finds the horse and wagon gone, in an action by the owner of the horse and wagon against the street railway company operating cars on the street for the killing of the horse and the injury to his wagon and harness caused by their being run into by a car of the defendant while the horse was without a driver, the question whether the plaintiff's servant was in the exercise of due care in leaving the horse unhitched while he went into the house is for the jury. *Carey v. Milford & Uxbridge Street Railway*, 161.
48. In an action by a grocer against a street railway company for the killing of the plaintiff's horse and injuries to his wagon and harness from being run into by a car of the defendant while the horse was astray without a driver and was proceeding on the track toward the car on a winter evening after dark, if it appears that the plaintiff's driver got on the car and immediately informed the conductor that his horse and wagon were astray and might get on the track, and if the conductor testifies that "he thought it his duty to," notify the motorman, and had started in just as the accident occurred," that he thought that he could walk the length of the car, which was only forty feet long, in half a minute if he had a clear aisle and that he had a clear aisle that night, and in another part of his testimony says that it was about a minute and a half after he was told before the horse was struck, and there is other testimony that the car went about a quarter of a mile after the driver got

Negligence (*continued*).

on before the accident happened, the question whether the conductor was negligent in failing promptly to inform the motorman of the danger after he was told of it himself is for the jury. *Carey v. Milford & Uxbridge Street Railway*, 161.

## Person driving across tracks.

49. If the driver of a milk wagon coming from an intersecting street into a street on which electric cars are operated, while still on the intersecting street at the only point at which the other street is visible, looks and sees no car approaching and as he goes into the street on which the cars run looks again and sees no car, and driving slowly looks again when his horse gets upon the track and sees a car approaching, and urges his horse ahead thinking that he can get across the track in time, but the rear part of his wagon and one of its hind wheels are struck by the car, in an action against the street railway company operating the car for injuries to his person and property thus caused, there is evidence for the jury that he was in the exercise of due care. *Harris v. Fitchburg & Leominster Street Railway*, 56.
50. In an action against a street railway company for personal injuries from being run into by a car of the defendant, when the plaintiff had driven in an open wagon from a private driveway which was screened from view by a large clump of lilac bushes at the side of the road and led almost at a right angle into the highway on which the defendant's car was being operated, if there is evidence that the car was running very fast, that no gong was sounded, that the motorman did not see the plaintiff until he was close upon him, and that just before the accident he was looking away to one side and was talking to a young woman who sat near him, the question of the defendant's negligence is for the jury. *Green v. Haverhill & Amesbury Street Railway*, 428.
51. In an action against a street railway company for personal injuries from being run into by a car of the defendant when the plaintiff had driven in an open wagon from a private driveway almost at a right angle into the highway on which the defendant's car was being operated, if there is evidence that the view of the plaintiff from the private driveway was so obstructed by trees and other objects that, if looking constantly, he could get only glimpses of an approaching car, that on the side of the road in the direction from which the car was approaching there was a large clump of lilac bushes which after he reached them cut off the plaintiff's view so that he could not see an approaching car until he was at the line of the highway and within nineteen feet of the defendant's track, that the plaintiff was seventy-two years of age and his hearing was slightly impaired, that his horse was a slow one, that as he was driving at a walk through the private way he looked and listened and did not see or hear the car, that when he was at the highway with his horse's head within ten feet of the rail, he saw a car rapidly approaching and tried with his whip to start his horse from a walk to cross the track quickly, and was struck by the car and injured. *Held*, that there was evidence for the consideration of the jury of due care on the part of the plaintiff; that, although it was probable that if the plaintiff had tried to stop his horse instantly the

accident might have been avoided, yet he could not be required to exercise such wisdom of choice as would be expected if he had had time for deliberation, and the jury might find that he acted as a person of ordinary prudence might be expected to act in like circumstances. *Green v. Haverhill & Amesbury Street Railway*, 428.

52. In an action against a street railway company for personal injuries from being thrown from the seat of a wagon by a collision with a car of the defendant after dark on an afternoon in winter, where it appears that the plaintiff was driving in a heavy covered wagon with a projecting top and sides at a slow trot on the right hand side of the track and turned diagonally across to the store of a customer on the left hand side of the street, when, just as the rear wheels cleared the track, the wagon was struck by a car of the defendant approaching from behind, if the defendant's motorman is not called as a witness, and there is evidence that the roadway at the point of the collision was lighted by an electric arc light, that the car was running on a straight track at a speed of not less than from ten to fifteen miles an hour, and as it approached the wagon, which from the platform of the car was plainly visible at the right of the track, the gong was not rung nor the speed slackened, there is evidence for the jury of negligence on the part of the defendant. *Stubbs v. Boston & Northern Street Railway*, 513.
53. In an action against a street railway company for personal injuries from being thrown from the seat of a heavy covered wagon by a collision with a car of the defendant after dark on an afternoon in winter, where it appears that the top and sides of the wagon projected beyond the seat where the plaintiff was driving, so that to look back from the side of the wagon he would have to leave his seat and stand on a step, but that back of the seat there was an aisle with shelves and cupboards on each side running to a door at the rear containing a window through which the plaintiff by looking back could obtain an unobstructed view of the roadway, if the plaintiff testifies that he was driving at a slow trot on the right hand side of a single track railway of the defendant, and, having occasion to cross to the store of a customer on the left hand side of the street, he before turning looked and listened to ascertain whether a car was approaching, and believing the track to be clear turned diagonally across the track, that as he drove into the track he looked as much as he could considering his wagon and listened and heard nothing and that just as the rear wheels cleared the track the wagon was struck by a car of the defendant approaching from behind, these statements of the plaintiff being somewhat modified but not substantially varied by the answers elicited in cross-examination, the question whether the plaintiff was in the exercise of due care is for the jury. *Ibid.*
54. In an action against a street railway company for personal injuries, if the plaintiff testifies that, late in the afternoon of a day in December when it was very dark, he was driving in a heavy express wagon, ten feet long, and swung his horse around upon the track of the defendant's railway for the purpose of backing up in front of a house to unload a barrel of flour, that before doing so, and also as he swung his horse around, he

*Negligence (continued).*

looked and listened in both directions and saw no car and heard no noise, gong or signal, and as he swung his horse back on the track again for the purpose of backing up and unloading he saw, by means of the light reflected on its side, a car approaching, without any headlight and giving no signal of its approach, one hundred feet or one hundred yards away and coming toward him fast, that he shouted to his horse to go ahead and the horse got across the track but the back of the wagon was struck by the car and the plaintiff was thrown out and injured, and if the motorman testifies that he rang his gong and that when he saw the wagon driven by the plaintiff about fifty feet ahead he shut off the power, reversed the motors and put on the air emergency brake, and had reduced the speed of the car to ten miles an hour when the collision occurred, and if both he and the conductor testify that the headlight was lighted, the questions, whether the plaintiff used due care in the management of his team and in his efforts to ascertain whether a car was approaching and whether the defendant was negligent in the management and equipment of its car, are questions of fact to be submitted to the jury. *James v. Interstate Consolidated Street Railway*, 264.

*Railroad.**Trespasser on car.*

55. If a boy eight years and five months old, with two other boys, is playing on the top of a freight car which forms part of a train, and is seen there by a brakeman who walks by on the top of the car, and if four or five minutes later this brakeman or another, while standing near the car on the top of which the boys are sitting, gives the signal to start the train without paying any attention to the boys, and, as the train begins to jerk more and more in starting, the first mentioned boy loses his balance and falls between the cars and is injured, in an action against the railroad company for his injuries these facts are not evidence of wanton conduct on the part of the servants of the company and give the boy as a trespasser no right to go to the jury. *Anternioitz v. New York, New Haven, & Hartford Railroad*, 542.

*Passenger on train.*

56. If a passenger in a train of a railroad company was injured in a collision which occurred when he unnecessarily had left his seat in the passenger compartment of a combination car and was standing in the baggage compartment with his hand on the side of the car, the fact that the conductor punched his ticket while he was in the baggage compartment does not give him a right to recover from the railroad company, if his injuries were due in part to his exposed position. *Bromley v. New York, New Haven, & Hartford Railroad*, 453.

57. If a passenger in a combination car on a train of a railroad company leaves the passenger compartment, where there are vacant seats, and goes into the baggage compartment to see a box of fowl and to talk with the baggage master about fowl, and if, while he is standing there with his hand on the side of the car, the train comes in collision with a part of

a freight train on the same track, and the passenger is thrown over a low box of fowl, striking his shin on the box before falling, and is injured by striking his head and side on the floor of the car, he cannot recover from the railroad company for his injuries, which in part were due to his having left the place assigned for passengers and occupying an exposed position. *Bromley v. New York, New Haven, & Hartford Railroad*, 453.

58. If a passenger in the smoking car of the train of a steam railroad, knowing but unmindful of the facts that the train is about to pass over a bridge that is undergoing repairs where there are double tracks and will have to pass by means of a crossover from one track to the other, that when the car strikes the switch there will be more or less of a jar, its force depending upon the speed of the train, and that the train is moving swiftly, and being unable to find a seat in the smoking car where five or six passengers are standing in the aisle, stands immediately inside the threshold of the doorway leading to the back platform of the car, with his back against the door, which is open, and his hands down at his sides, when there come a lurch and jar of the train which throw him against another passenger and then out on the platform and backward to the ground, where he is injured, he has not exercised due care and cannot recover from the railroad company for his injuries, even if the company was negligent. *Foley v. Boston & Maine Railroad*, 332.

Fact that conductor punched ticket of passenger occupying unnecessarily exposed position voluntarily assumed on railroad train does not make company liable if passenger is injured in collision partly because of such exposed position; nor is it material that passengers customarily occupied such position and had their tickets punched there by conductor, see *ante*, 56; EVIDENCE, 24.

Intoxicated passenger left in unsafe place at station.

59. Where a passenger in a car of a train of a railroad company is so intoxicated as to be incapable of standing or walking or taking care of himself in any way, *semble*, that the conductor and brakeman of the train are under no obligation to remove him from the car when the train stops at his destination, but, if they voluntarily undertake to help him from the car, they are bound to use ordinary care not only in the act of his removal but also in selecting the place in which to leave him. *Black v. New York, New Haven, & Hartford Railroad*, 448.
60. If the conductor and brakeman of a local passenger train of a railroad company, on arriving at a station which is the destination of a passenger in one of the cars of the train, who is so intoxicated as to be incapable of standing or walking or caring for himself in any way, knowing this passenger's condition, take him out of the car and across the platform of the station and finally leave him half way up a flight of ten or twelve steps leading to the station above, and the passenger falls backward, strikes on the back of his head and is injured, in an action by the passenger against the railroad company for his injuries, it can be found that, in view of the plaintiff's manifest condition, the servants of the defendant were negligent in leaving him without a reasonable regard for his safety in a place



Negligence (*continued*).

where a fall would be likely to do him much harm ; and it also can be found that the plaintiff was free from any negligence that was a direct and proximate cause of his injuries. *Black v. New York, New Haven, & Hartford Railroad*, 448.

Shipper of freight and his employees.

61. It is the duty of a railroad company as a common carrier of goods to provide a safe and proper place for their delivery, and, if in transporting a car load of hay it chooses to deliver the hay from the car while standing on a track in its freight yard instead of unloading the car and delivering the hay at its freight house, it is bound to keep the car in a safe condition for the use of the persons employed by the owner of the hay to take it out. *Ladd v. New York, New Haven, & Hartford Railroad*, 359.

62. If a railroad company receives a car belonging to another company loaded with goods for transportation over its road, and on the arrival of the car at its destination leaves it standing on a track in one of its freight yards and directs the owner of the goods to unload them from the car at that place, it has made the car one of its appliances for which it is responsible; and the fact that the car is the property of another is immaterial as affecting its duty to keep the car in a safe condition for the delivery of the goods. *Ibid*.

63. In an action against a railroad company by a teamster sent by his employer, who had purchased a car load of hay, to help in unloading the hay from the car, and injured by a defective door of the car which fell upon the plaintiff as he was trying to open it, there was evidence that the car had been placed on a track in a freight yard of the defendant for the purpose of being unloaded by the purchaser of the hay who had been directed by the yard clerk of the defendant to unload it at that place, and that two or three days before the happening of the accident the plaintiff's employer went to the car to remove some of the hay and found that the door was defective, whereupon he notified the yard clerk that the car was in bad order. The defendant contended that the proximate cause of the accident was the negligence of the plaintiff's employer who, having full knowledge of the existing defect, sent the plaintiff to unload hay from the car and failed to give him any warning in regard to it. *Held*, that, apart from the question whether the defect in the car was a latent one or whether it could have been discovered by a proper inspection, as to which no opinion was expressed, there was evidence warranting a finding that the defendant's yard clerk after due notice from the plaintiff's employer failed to make any proper examination of the car or the door, and that the defendant was negligent in not having remedied the defect or having done something to guard against injury resulting from its existence, there having been other evidence in the case from which the jury might have found, irrespective of the notice from the plaintiff's employer, that the defendant had had a sufficient opportunity to discover and remedy the defect or to guard against injurious consequences resulting from it before using the car as a place of delivery; and that, the defendant having invited the plaintiff's employer and the plaintiff as his employee to come to the car

to remove the hay therefrom, the plaintiff's employer owed no duty to the defendant to warn the plaintiff of the danger to be apprehended if, as turned out to be the case, the defendant should neglect to repair the defect to which he had called the attention of its servant. *Ladd v. New York, New Haven, & Hartford Railroad*, 359.

Employee of company.

Railroad company held liable for death of train checker employed in its freight yard and killed by reason of person in charge of train causing cars to be kicked down track at night without light upon them and with no one in charge of them, see *ante*, 11.

Mail bags negligently left near highway.

Evidence held sufficient to warrant submission to jury of question whether railroad company was liable for injuries due to plaintiff's horse on travelled part of highway being frightened by pile of mail bags left by defendant's employees lying by the side of highway, in custody and control of defendant, see *NUISANCE*, 2.

*In Use of Highway.*

64. In an action against a town for personal injuries and for damage to a horse and buggy from an alleged defect in a highway, if it appears that the plaintiff, while crossing a bridge only thirteen and a half feet wide which he knew well and knew to be without suitable railings, was driving a blind horse, gentle and not in the habit of stumbling, at a slow trot with the reins in his left hand and was using his right hand to tuck in the lap robe, when the horse stumbled and jerked the reins, the plaintiff grabbed the reins with his right hand and in an instant the plaintiff with his horse and buggy went over the side of the bridge into the brook below, it is a question for the jury whether the plaintiff was in the exercise of due care. *Cutting v. Shelburne*, 1.

65. In an action by a child, one year and nine months old when injured, for personal injuries from being run into and knocked over by a meat wagon of the defendant, where there is evidence that the driver was walking his horse in broad daylight in a wide, straight street, and before he saw the child saw an acquaintance to whom he spoke, in doing which he turned his head around away from the side where the child was, if the driver testifies that he saw some boys standing at a watering trough on the other side of the street and that he did not see the child until he was six inches from the hub of his front wheel, and another witness testifies that when the team struck the child the driver's head was turned looking behind him on the side away from the child and that there were no other teams "around there," there is evidence for the jury of negligence on the part of the driver. *Norris v. Anthony*, 225.

Liability of street railway company for negligently running car against workman of city macadamizing street near car tracks, see *ante*, 46.

Evidence warranting submission to jury of question whether driver of milk wagon approaching from intersecting street and attempting to cross street on which electric cars ran was in exercise of due care, see *ante*, 49.

*Negligence (continued).*

Action by driver of heavy wagon with cover shutting out view of street behind unless driver got down on step of wagon, struck by electric car approaching from behind as plaintiff crossed track diagonally, see *ante*, 52, 53.

Action against street railway company by boy eight years of age crossing street where he knew that cars ran frequently and struck by car of defendant because of alleged negligence of motorman in not ringing gong, seeing boy, or applying emergency brake, see *ante*, 42, 43.

Action against street railway company for injury to plaintiff's horse attached to wagon which driver in delivering groceries had left standing unhitched and unattended on street along which electric cars ran and which had wandered upon tracks of defendant, see *ante*, 47, 48.

Traveller on highway who, while crossing double tracks of street railway where line of cars on nearer track obstructed view of farther track, went upon farther track without looking or listening and was struck by car passing there and was injured, held not in exercise of due care, see *ante*, 44.

Action under R. L. c. 111, § 267, against street railway company for causing death of plaintiff's intestate, seventy years of age, as at night he was crossing street along which defendant's cars ran, held not maintainable because of lack of evidence either of negligence of company or gross negligence of its employees, see *ante*, 45.

Evidence held sufficient to warrant submission to jury of question whether railroad company is liable for injuries due to plaintiff's horse on travelled part of highway being frightened by pile of mail bags left by defendant's employees lying near side of highway, in custody and control of defendant, see *NUISANCE*, 2.

Where one uses due care in entering and continuing as guest in vehicle, driven by another person, and is injured partly through driver's negligence and partly through negligence of third person, driver's negligence should not be imputed to guest in action by guest against third person, see *ante*, 2, 3.

Conflicting evidence on question of plaintiff's due care and negligence of defendant's employees held rightly to have been submitted to jury where plaintiff's evidence showed that when struck by car of defendant railway company he was backing heavy express wagon ten feet long up to house and swinging horse around upon tracks after looking and listening but neither seeing nor hearing approaching car, and that car which struck him had no headlight and rang no gong, see *ante*, 54.

Action for personal injuries against street railway company by one seventy-two years old with defective hearing driving upon street car tracks from private way at right angles therewith where view of track was almost entirely cut off who, when seeing car, committed error of judgment in whipping up horse, there being evidence that motorman was not using caution in approaching crossing and was conversing with passenger, see *ante*, 1, 50, 51.

### *Building Operations.*

Civil engineer employed by metropolitan water and sewerage commissioners present at and in charge of work growing out of construction of Wachu-

sett reservoir held not as matter of law to be mere volunteer or licensee, to be lacking in due care or to have assumed risk of injury caused by negligent handling of mast of derrick being erected by employees of one doing work under contract with Commonwealth, see *ante*, 5.

*Elevator.*

Action against owner of building for injuries to plaintiff caused by her falling down elevator well of which she had no warning while she was inspecting premises at defendant's request with view to becoming tenant, see *post*, 67

*In Factory.*

Action by boy employed in cotton mill against employer for injuries received because of alleged negligent starting of mule which plaintiff in course of employment was cleaning, see *ante*, 7, 9, 23.

Boy injured in yard of jewelry factory by splashing of acid into his eyes while dipping it up with small pitcher from which handle had been broken allowed to recover from employer, see *ante*, 22.

Action by employee in factory for making bridge materials against employer for injuries received because of breaking of hoisting-chain due to crystallization which could have been prevented by periodical annealing, see *post*, 12.

Action by experienced workman in wire factory against employer for injuries received by breaking of bolt in machine he had worked on for fourteen years, where only evidence as to bolt was old flaw at point of breakage, and that part of break looked fresh and the rest rusty, see *ante*, 17.

In action by employee in factory for injuries caused by bursting of steam pipe which was part of power plant, plaintiff rightly was allowed to go to jury upon evidence of defects in construction of appliances and evidence of happening of accident, and it was held that neither evidence that different parts of the appliances were made by reputable concern and sold to defendant, nor evidence that defendant inspected the plant in customary manner constituted defence, it appearing that defendant set up parts and that defect in arrangement would account for accident, see *ante*, 13, 14.

*In Laundry.*

Boy eighteen years of age employed in laundry and injured by defective revolving basket of extractor packed by himself allowed to recover for injuries from employer, see *ante*, 20, 21.

*In Use of Fire.*

Questions of admission in evidence of declarations of deceased persons under R. L. c. 175, § 66, at trial of action for injuries alleged to have been caused by negligence of defendant in use of fire on his land which spread to plaintiff's woodlot, see PRACTICE, CIVIL, 16, 41, 42.

*In Freight Yard.*

Railroad company held liable for death of train checker employed in its freight yard and killed by reason of person in charge of train causing cars to be kicked down track at night without light upon them and with no one in charge of them, see *ante*, 11.

*Mail Bags beside Highway.*

Evidence held sufficient to warrant submission to jury of question whether railroad company is liable for injuries due to plaintiff's horse on travelled part of highway being frightened by pile of mail bags left by defendant's employees lying near side of highway in custody and control of defendant, see NUISANCE, 2.

*Of Municipality as to Highway.*

See WAY, 1-4.

*Of Employees of Public Charitable Institution.*

66. The trustees of an unincorporated home maintained for the free education and maintenance of deserving and indigent boys if they have used reasonable care in the selection of their servants are not liable for injuries caused by the negligence of such servants. *Farrigan v. Peccar*, 147.

*Of One owning or controlling Real Estate.*

67. In an action against the owner of a building for personal injuries from falling down an elevator well, there was evidence that the plaintiff was a boarding house keeper and was looking for another house in which to carry on her business, that she saw an advertisement of the defendant's building and going to the defendant's office found there an agent of the defendant who gave her the keys of the building and told her to go and see it, that on going to the building she found the outside door open and entered a dark and narrow entry at the end of which she could see a door with ground glass panels in it but could see nothing else, that she supposed it to be the door of the kitchen or dining room and thought she would like to see the room, that she walked forward putting out her hand in front of her on account of the darkness and walked into an elevator well of which the doors were wide open, the elevator car being at the floor above. The door with the ground glass panels was at the back of the elevator well. It had been the door of a doctor's office before the elevator was put in but thereafter had been disused and was closed by a bar. *Held*, that the evidence justified a finding that, in view of the darkness of the entry, the existence of the elevator well and the appearance of the door with glass panels at the back of the well, the defendant was negligent in failing to warn the plaintiff of her danger; that the plaintiff, being upon the premises by invitation of the defendant for the purpose of examining them, was justified, in the absence of any information to the contrary, in thinking that the door led to some part of the building to be let and in trying to reach it as she did; and that the case properly was submitted to the jury. *Wills v. Taylor*, 118.

Landlord responsible to tenant for injuries received by tenant because of defect in outside steps of house let if defect was not apparent at time of letting, see *LANDLORD AND TENANT*, 3.

Questions of admission in evidence of declarations of deceased persons under R. L. c. 175, § 66, at trial of action for injuries alleged to have been caused by negligence in use of fire on defendant's land which spread to plaintiff's woodlot, see *PRACTICE, CIVIL*, 16, 41, 42.

*Defective Staging.*

Action by employee against employer for injuries received because of alleged negligence of superintendent of defendant in leaving plaintiff, experienced painter, with two others to use extension ladder as staging, see *ante*, 15, 16.

*Telephone Exchange.*

Action by employee for injuries received while acting as telephone exchange operator through electric shock caused by defective apparatus, see *ante*, 8, 18, 19.

*Causing Death.*

In order for widow to maintain action under R. L. c. 106, § 73, against husband's employer for causing instantaneous death of husband plaintiff must show affirmatively that husband, at time of accident, was in exercise of due care, see *ante*, 24.

Action under R. L. c. 111, § 267, against street railway company for causing death of plaintiff's intestate, seventy years of age, as at night he was crossing street along which defendant's cars ran, held not maintainable because of lack of evidence either of negligence of company or of gross negligence of its employees, see *ante*, 45.

Railroad company held liable for death of train-checker employed in its freight yard and killed by reason of person in charge of train causing cars to be kicked down track at night without light upon them and with no one in charge of them, see *ante*, 11.

*Gross.*

Action under R. L. c. 111, § 267, against street railway company for death of plaintiff's intestate, seventy years of age, as at night he was crossing street along which defendant's cars ran, alleged to have been caused by negligence of company or gross negligence of company's employees held not maintainable because of lack of evidence to establish allegations, see *ante*, 45.

*Res Ipsa Loquitur.*

68. The doctrine of *res ipsa loquitur* applies only where the accident is such that there is just ground for a reasonable inference that according to ordinary experience it would not have occurred without negligence on the part of the defendant. *Thomas v. Boston Elevated Railway*, 438.

In action by woman passenger against street railway company, mere fact

*Negligence (continued).*

that plaintiff's dress caught on something as she was alighting from car and firmly held her after falling is not sufficient to warrant submission of case to jury, see NEGLIGENCE, 38.

*Proximate Cause.*

Railroad company, negligence of whose servants is proximate cause of injury to one so intoxicated as to be incapable of either standing or walking, is liable for such injuries, see *ante*, 6, 59, 60.

Question of whether railroad company which furnishes defective car to consignee as place for unloading freight whereby consignee's employee is injured is responsible, or whether negligence of consignee who sent employee to car knowing of its defective condition is proximate cause of accident, see NEGLIGENCE, 61-63.

NEW TRIAL.

See PRACTICE, CIVIL, 10, 11.

NUISANCE.

1. The owner of a building in a city adjoining a passageway ten feet wide, having the right to maintain windows, doors and other openings into and upon the passageway for light and air and to ventilate into it by any proper means, has no right to maintain and operate an electric fan in such a way as to send a current of heated air impure and charged with offensive smells into and across the passageway so as to strike a window of a building on the opposite side of the passageway and to enter it when open; and the owner and the lessee of such opposite building may maintain a suit in equity to enjoin such maintenance and operation of the fan as a nuisance, although the defendant's right of ventilation may include the right to project pure air into the passageway. *Vaughan v. Bridgham*, 392.
2. In an action against a railroad company for personal injuries caused by the horse of the plaintiff running away when frightened by a number of mail bags allowed by the defendant to lie on a pile of snow in the highway near the travelled path, there was evidence that the plaintiff was in the exercise of due care and that the horse he was driving was gentle and well broken, that the mail bags were placed on a pile of snow about six feet from the railroad tracks at a grade crossing of the highway and were three or four feet from the sleigh track or travelled path of the highway, that the accident happened about seven o'clock in the morning, that the mail bags had arrived at twenty-five minutes before that hour and were during that time, and thereafter until their delivery at the post office, in the custody and under the control of the defendant. *Held*, that there was evidence upon which a jury might find that the mail bags were piled up in such a manner and in such proximity to the travelled part of the highway as to be likely to frighten horses, ordinarily gentle and well broken, while travelling upon the way, and thus to constitute a

menace to public travel, and also might find that the defendant, knowing through its servants the position of the bags, negligently suffered them to lie there a longer time than reasonably was necessary and thereby to become a nuisance, and that the case should have been submitted to the jury. *Horr v. New York, New Haven, & Hartford Railroad*, 100.

Landlord who has leased premises for term of years under lease reserving right at reasonable times to enter "to view the premises, and make repairs and improvements," not liable for injuries received from nuisance caused by ice and snow collecting on roof, see **LANDLORD AND TENANT**, 4.

Action against owner of building for injuries to plaintiff caused by her falling down elevator well of which she had no warning and into which she stepped because of misleading position of door, while she was examining premises at defendant's invitation with view to becoming tenant, see **NEGLIGENCE**, 67.

#### OFFICER.

Rights of constable as officer of the watch authorized to serve criminal process entering railroad train without warrant for purpose either of examining persons abroad or of apprehending criminals, see **CONSTABLE**, 1-4.

#### OLD COLONY RAILROAD COMPANY.

St. 1900, c. 439, § 6, apportioning part of cost of completion of Acushnet River bridge between New Bedford and Fairhaven upon Old Colony Railroad Company above railroad of which bridge passes instead of crossing it at grade is constitutional, see **ACUSHNET RIVER BRIDGE**, 1.

#### OLD COLONY STREET RAILWAY COMPANY.

In the provision of § 3 of St. 1901, c. 214, extending the corporate powers of the Brockton Street Railway Company, to which the Old Colony Street Railway Company has succeeded, that "Said company may, for all purposes necessary or incident to the construction, maintenance and operation of an electric street railway, generate, manufacture, use and transmit electricity in any city or town wherein it is now or may hereafter be entitled to operate a street railway, and for that purpose may erect and maintain poles, trolley, feed and stay wires and other devices for conducting electricity in, over and under any streets, highways, bridges and town ways in any of said cities and towns wherein it has been or may hereafter be authorized by the board of aldermen or selectmen to operate its railway," the word "wherein," as last used, refers to "cities and towns" and not to "streets, highways, bridges and town ways," and the corporation has power to maintain poles and wires for the transmission of electricity for its corporate purposes in streets through which it is not authorized to operate its railway. *Williams v. Old Colony Street Railway*, 305.



**ONSET BAY GROVE ASSOCIATION.**

Charter of Onset Bay Grove Association, corporation created by St. 1877, c. 98, held to give corporation power to use property as summer resort and provide for camp meeting of spiritualists, see **CORPORATION**, 1.

**PARENT AND CHILD.**

Action by husband against father of his wife for alienation of her affection held rightly submitted to jury on question whether defendant was actuated by malice toward plaintiff, see **ALIENATION OF AFFECTION**, 1, 2.

**PASSENGER.**

Liability of railroad company as carrier of passengers for injuries resulting from negligence of itself or its servants or employees, see **NEGLIGENCE**, 56-60.

Liability of street railway company as carrier of passengers for injuries resulting from negligence of itself or its servants or employers, see **NEGLIGENCE**, 28-40.

Whether street railway company using force so imperfectly understood as electricity as motive power might not be liable for injury to passenger caused by flash from controller although flash could not have been prevented by any means yet devised, see **NEGLIGENCE**, 31.

Whether employee of street railway company, who, with other employees, had been transported free on company's lines for number of years, but within two or three years annually had had thrown out to him pass with his pay envelope, nothing being said, terms of pass stating that employee using it assumed all risk of accidents while doing so, can recover for injury which occurred through company's negligence while he was on company's car using pass and not on company's business, see **CARRIER**, 3, 4.

**PATENT.**

Opinion of justices as to constitutionality of proposed legislation restricting making of certain contracts for lease of patented machinery, see **CONSTITUTIONAL LAW**, 7-11.

**PAYMENT.**

Where case of plaintiff or demandant depends on proving breach of condition of mortgage by failure to make payments required by its terms, burden is on him to prove that such payments were not made, see **EVIDENCE**, 5, 7; whether production of mortgage is even *prima facie* proof of such non-payment, see *ibid.* 6.

Whether capital stock of Massachusetts corporation properly was paid for to conform to return made by directors, and whether suit in equity is maintainable for false return, see **CORPORATION**, 2; **EQUITY JURISDICTION**, 8.

Assignee of account is not bound by fact that payments were made by debtor to assignor after notice of assignment, where it is not shown that

assignee knew of or acquiesced in such payments, and assignee in action against debtor is not estopped to deny validity of such payments, see **ASSIGNMENT**.

### PERPETUITIES.

For contract for employment of agent held not contrary to rule against perpetuities because personal, see **CONTRACT**, 6.

### PERSONAL PROPERTY.

Questions, whether owner of building which is personal property can create life interest in it with reversion to himself and, if so, whether he can do it orally, not passed upon because oral arrangement alleged to have transferred life interest was held to be merely executory contract, see **CHATTEL**; **CONTRACT**, 10.

### PLEADING, CIVIL.

#### *Declaration or Petition.*

1. In a petition to recover from a city assessments for street watering paid under protest, an averment, that the lot opposite the petitioner's estate is unoccupied, belongs to two owners and is divided in the middle by a fence, is not equivalent to an averment that the petitioner's estate is not an occupied estate in the central portion of a large city. *Hodgdon v. Haverhill*, 327.
2. A declaration in an action against a city, purporting to be an action of contract, alleging that the defendant is indebted to the plaintiff in a sum named, by reason of making a forcible entry upon the plaintiff's close and appropriating a certain portion of the plaintiff's front yard for sidewalk use, and continuing in adverse possession thereof for nearly twenty years, assessing and collecting taxes against the land and refusing the plaintiff compensation, the plaintiff claiming sufferance rent for the period of detention of the land by the defendant, does not set forth a cause of action. *Ibid*.

After verdict for plaintiff in action for slander and at argument of defendant's exceptions, defendant cannot for first time object that declaration does not set forth cause of action because failing sufficiently to set forth circumstances under which words were spoken; such point should have been raised by demurrer to declaration, see **PRACTICE, CIVIL**, 44.

Declaration in contract on instrument in writing under seal between lumber company, defendant, and plaintiff, appointed by company its "sales agent, for the sale of all the lumber that will or may be sawed from the timber now owned by the company on" certain tract, held, on demurrer, to set forth no cause of action, see **CONTRACT**, 11, 21.

It is not within jurisdiction of Superior Court to allow petitioner for damages under statute to amend petition by adding separate claim barred by limitation of statute at time of amendment, see **SUPERIOR COURT**, 1-3.

*Demurrer.*

Defence of statute of limitations in personal action must be taken by answer and not by demurrer, *see post*, 8.

*Answer.*

3. The defence in a personal action that the cause of action accrued more than six years before the date of the writ must be taken by answer and not by demurrer. *Hodgdon v. Haverhill*, 327.

## PLEADING, CRIMINAL.

*Indictment.*

An indictment under R. L. c. 212, § 16, as amended by St. 1905, c. 316, charging the defendant with knowingly distributing and circulating a printed paper conveying notice of a place where directions, information and knowledge might be obtained for the purpose of causing and procuring the miscarriage of women pregnant with child, is sufficient under R. L. c. 218, §§ 17 and 29, if the crime is set forth in the words used in the statutes with a general averment that the defendant committed the act, and no further averment of a guilty knowledge of the contents of the paper is necessary. *Commonwealth v. Harford*, 464.

## PLEDGE.

Shares of stock in corporation held by broker under agreement of pledge with customer for whom broker bought them are not taxable to broker, *see TAX*, 4-6.

Interest of citizen and resident of another State in policy of insurance issued to him by Massachusetts corporation and by him delivered to pledgee here is equitable asset of pledgor here, *see JURISDICTION; EQUITY JURISDICTION*, 5.

## POLICE.

Janitor of police station in Boston is not police officer nor member of police department nor subordinate of officer or board of city, and veteran not registered with civil service commissioners so employed before such employment was included in list to be filled by certificates from such commissioners may be discharged without cause; but not so after he is registered and the employment is put on such list, *see MUNICIPAL CORPORATIONS*, 1, 2; *VETERAN*, 1, 2.

## POOR DEBTOR.

In an action upon a poor debtor's recognizance, the plaintiff put in evidence docket entries of a district court constituting the record of proceedings in that court as follows: "Hearing upon said debtor's application was begun May 3, 1905, and thereupon continued to August 3, 1905, at 9 A. M., and on August 3, 1905, was further continued to September 30, 1905, at 9 A. M.,

on which last date nothing was done in said proceedings between the hours of 9 and 10 o'clock A. M. At 2 minutes past 10 o'clock A. M. on September 30, 1905, the debtor first called the court's attention to his presence in court, and moved to continue the proceedings herein, but this motion was overruled." *Held*, that the entries were consistent with the assumption that the judge of the district court had been present personally during the whole of the hour that elapsed while the debtor also had been in attendance, and that it did not appear that the creditor attended either personally or by counsel, and therefore that the plaintiff did not sustain the burden of proving affirmatively that there had been a breach of the recognizance. *Warburton v. Gourse*, 203.

## PRACTICE, CIVIL.

### *Parties.*

Commonwealth cannot be impleaded in its own courts except by its consent clearly manifested by act of Legislature, see COMMONWEALTH, 1, 2.

### *Venue.*

1. A complaint in bastardy process under R. L. c. 82 may be brought in the county where either of the parties lives. *Kennedy v. McLellan*, 528.
2. Under the exception to the right of appeal from a judgment of the Superior Court to this court contained in R. L. c. 173, § 96, which was repealed by St. 1906, c. 342, § 2, where a defendant in answer to a complaint in bastardy process under R. L. c. 82, pleaded, in a so called plea in abatement, to the jurisdiction of the court, and moved that the complaint be abated because it did not allege that he either lived or had his usual place of business within the judicial district of the court or in the county in which the complaint was made, it was *held*, that, even assuming that the plea in abatement, although so entitled, could be treated as a motion to dismiss, yet as such a motion it should be denied, as in cases under R. L. c. 82 it is the Superior Court which has jurisdiction, and the proceedings in the police, district or municipal court are merely initiatory, so that it is sufficient if the process is brought to a hearing in the county or judicial district in which either the complainant or the defendant resides. *Ibid*.

### *Attachment.*

No attachment by special precept in Superior Court under R. L. c. 167, § 80, can be made by trustee process unless one of alleged trustees dwells or has usual place of business in county where action is pending, see ATTACHMENT.

### *Premature Action.*

No action under R. L. c. 149, § 23, can be maintained on executor's bond for failure to pay distributive shares of residue of estate until demand has been made for such payment, see EXECUTOR AND ADMINISTRATOR, 6.

Plaintiff held unable to maintain action of contract because, if he elected to be bound by certain contract, action was brought prematurely, and if

Practice, Civil (*continued*).

he repudiated contract, he was barred by statute of limitations, see CONTRACT, 20.

*Election.*

Plaintiff held unable to maintain action of contract because, if he elected to be bound by certain contract, action was brought prematurely, and if he repudiated contract, he was barred by statute of limitations, see CONTRACT, 20.

Although veteran employed by city under R. L. c. 19, §§ 23, 24, and civil service commissioners' rules and wrongfully discharged while there was work to be done of sort for which he was employed has brought action to recover wages due since discharge, he can maintain petition for writ of mandamus to compel reinstatement, see VETERAN, 3.

*Estoppel.*

Consent by defendant to default in police, district or municipal court and judgment in accordance therewith do not estop him from appealing to Superior Court under R. L. c. 173, § 97, see *post*, 27.

*Amendment.*

Allowance of amendment to petition under statute for damages adding separate claim barred by limitation of statute is not within court's discretion, being outside its jurisdiction, see SUPERIOR COURT, 1-3.

No exception lies to refusal of judge to allow amendment to bill of exceptions by inserting exceptions to exclusion of certain evidence, motion to amend being made after filing of bill and more than twenty days after verdict, see *post*, 34.

This court has no jurisdiction to allow amendment to bill of exceptions, but party desiring amendment should ask this court to strike case from docket and remit it to court in which exceptions were allowed where proper motion should be made, see *post*, 30, 31.

*Motion to dismiss.*

Informal motion to dismiss bastardy process under R. L. c. 82, because complaint in municipal court failed to allege that defendant either lived or had usual place of business in district of court was denied because proceedings in lower court are initiatory only, case really being in Superior Court which has jurisdiction if either complainant or defendant resides in county or judicial district where case is heard, see *ante*, 1, 2.

*Abatement.*

3. While the exception to the right of appeal from a judgment of the Superior Court to this court contained in R. L. c. 173, § 96, which was repealed by St. 1906, c. 342, § 2, was in force, a judgment on an answer in abatement was final although the defence set up in it was one of substance relating to the jurisdiction of the court. *Kennedy v. McLellan*, 528.

*Set-off.*

Right to prosecute declaration in set-off lost by default in principal action, *see post*, 4.

*Default.*

4. If the defendant in an action of contract has filed a declaration in set-off and has been defaulted, he cannot at a hearing for the assessment of the plaintiff's damages introduce evidence in support of his declaration in set-off, having lost by his default the right to prosecute it. *Squier v. Barnes*, 21.

Denial of motion to remove default is within discretion of presiding judge and not subject of exception, *see post*, 32.

Default entered in police, district or municipal court by consent of defendant and judgment in accordance therewith do not estop defendant from appealing to Superior Court, *see post*, 27.

Fact that defendant was defaulted does not deprive him of right to file motion for continuance based on suggestion of bankruptcy and to have motion heard, *see BANKRUPTCY*, 2.

*Assessment of Damages after Default.*

Where defendant in action of contract has been defaulted, he cannot on hearing for assessment of plaintiff's damages introduce evidence in support of declaration in set-off, *see ante*, 4.

*Agreed Statement of Facts.*

5. No inferences can be drawn from an agreed statement of facts unless the power to do so is given by the agreement. *Brooks v. West Springfield*, 190.

6. In a case presented on an agreed statement of facts which does not provide that the court may draw inferences of fact the plaintiff cannot recover unless the matters stated entitle him to a judgment as a matter of law. *Coffin v. Artesian Water Co.* 274.

*Law and Fact.*

Refusal by judge presiding at trial to make ruling requested by defendant as one of law, question appearing at argument of bill of exceptions to be one of fact on which this court could not say that judge was wrong, affords no ground for sustaining exception, *see CARRIER*, 4.

*Judicial Notice.*

Courts take judicial notice of statutes contained in the Revised Laws, and a refusal to admit such statutes as evidence is not ground of exception, *see EVIDENCE*, 1.

Courts take judicial notice of facts that in proper operation of passenger train on steam railroad there may be jerks and jars, and that from time to time repairs of bridges and tracks are necessary, causing use of cross-overs from one main track to another, *see EVIDENCE*, 2, 3.

*Issues for Jury.*

On appeal from Land Court to Superior Court issues for jury must be framed in Land Court and such framing is necessary to complete appeal, see LAND COURT.

*Verdict.*

After verdict for defendant trial judge has no power to make order granting plaintiff's motion for new trial unless defendant consents to verdict for plaintiff for sum named, see *post*, 10, 11.

Verdict for plaintiff in action for slander and special finding that defendant used language set forth in declaration dispose of exception by defendant to refusal of presiding judge to rule that if words were spoken as defendant testified verdict should be for defendant, and to further objection, not taken by demurrer, that declaration did not set forth cause of action, see *post*, 43-45; whether after verdict and at argument of exceptions defendant can for first time question proof that plaintiff, who alleges charge of adultery, was a married woman, *quære*, see LIBEL AND SLANDER, 1.

*Special Questions to Jury.*

7. A party to an action, who at the trial took no exception to the submission of a special question to the jury and apparently made no objection to the manner in which it was submitted, when his case is before this court on exceptions cannot raise the point that he was prejudiced by the form of the question to the jury, especially where as here the description in the bill of exceptions of the transaction to which the question related makes clear both the meaning of the question and the correctness of the answer. *Richardson v. Devine*, 386.

*Actions tried together.*

Where action by buyer of goods against seller for non-delivery is tried together with action by same plaintiff against carrier for non-delivery of same goods and seller testifies in own behalf he can be cross-examined by carrier against his objection, see *post*, 20.

*Auditor's Report.*

8. Where the rule to an auditor contains an agreement of the parties that the auditor's findings of fact shall be final, his rulings as to the admission of evidence are subject to review by the trial court upon a motion to re-commit the report on account of alleged errors in such rulings, and if the motion is denied the party aggrieved may appeal to this court. *Petty v. Benoit*, 238.

*Report by Judge.*

9. Where an action of contract, begun by trustee process, in which a judge of the Superior Court ruled that the trustee should be discharged, comes to this court by report, and it appears that the trustee had in his hands no goods, effects or credits of the defendant, so that the ruling of the judge was right, but no reason appears why the plaintiff is not entitled to judg-

ment for a balance due to him and there is no way of ascertaining from the report what that balance is, the case will be remitted to the Superior Court with directions to ascertain the amount due and, when it is ascertained, to enter judgment accordingly in favor of the plaintiff. *Durfee v. Meadowcroft*, 267.

*Motion for Continuance.*

Effect of provisions of bankruptcy act of 1898, c. 541, § 11, on motion for continuance of suits against bankrupt pending at time of filing of petition, see **BANKRUPTCY**, 2-4.

*New Trial.*

10. On a motion for a new trial by a plaintiff after a verdict for the defendant, the presiding judge has no power to make an order granting the motion unless on or before a certain date the defendant consents to the entry of judgment in favor of the plaintiff for a sum named. *Shanahan v. Boston & Northern Street Railway*, 412.
11. Where, on a motion by a plaintiff for a new trial after a verdict for the defendant, the presiding judge made an order granting the motion unless on or before a certain date the defendant consented to the entry of judgment in favor of the plaintiff for a sum named, and the defendant so consented if the judge had power to make the order, and the order was vacated as beyond the power of the judge, it was ordered that the motion for a new trial should stand for a further hearing. *Ibid.*

*Discretion of Court.*

Exercise of discretion of presiding judge will not be disturbed merely because in opinion of this court it would have been exercised better by admitting evidence which he excluded on ground of remoteness, see **EVIDENCE**, 28.

Proper exercise of discretion by presiding judge in conduct of trial, see *post*, 12-22.

Proper exercise of discretion by presiding judge as to examination and cross-examination of witnesses, see **WITNESS**, 1-3; *post*, 20.

Denial of motion to remove default is within discretion of presiding judge and not subject of exception, see *post*, 32.

It is not within court's discretion to allow amendment to petition under statute for damages adding separate claim barred by limitation of statute, it being outside court's jurisdiction, see **SUPERIOR COURT**, 1-3.

It is within discretion of judge presiding at trial either to submit to jury or withhold from their consideration documents admissible in evidence only on particular issue but introduced generally, see *post*, 13.

It is within discretion of judge presiding at trial to exclude evidence offered by defendant to show that sidewalk with Hyatt lights alleged by plaintiff to be defective was "of the usual and ordinary construction for that kind of a walk," see **EVIDENCE**, 28.

Trial judge has no discretionary power after verdict for defendant to make



Practice, Civil (*continued*).

order granting plaintiff's motion for new trial unless defendant consents to verdict for plaintiff in sum named, see *ante*, 10, 11.

*Striking out Evidence.*

Instruction to jury to disregard certain evidence as hearsay is compliance with motion to strike out that evidence, see *post*, 18.

*Conduct of Trial.*

12. The admission at a trial of evidence which is admissible for a limited purpose and otherwise is immaterial, if the purpose for which it is admitted is pointed out carefully by the judge in his instructions to the jury, is no ground for exception. *Sullivan v. Crave & Martin Co.* 435.
13. If documents which are admissible in evidence only on a particular issue are put in evidence generally against the general objection and exception of the adverse party, it is within the discretion of the presiding judge either to submit such documents to the jury or to withhold them, and to the exercise of this discretion no exception lies. *Paquette v. Prudential Ins. Co. of America*, 215.
14. Where at a trial an undisputed fact, asserted by one side and testified to by the other, repeatedly was referred to by the presiding judge in his charge as a fact that the jury might find, his refusal to state this fact in terms to the jury, which would have given his charge the effect of an argument, is no ground for exception. *Rice v. James*, 458.
15. In an action for the price of goods sold and delivered, where the plaintiff sought to show the liability of the defendant by proving a sale to a broker alleged to have been his agent, there was evidence that in all the previous transactions with the plaintiff in which the broker represented the defendant he was given special authority for each transaction and never acted under a general authority, but there was no evidence that before the transactions in question the defendant ever notified the plaintiff of any limitation of the agent's authority. The plaintiff asked for an instruction in regard to the agent's ostensible authority. The judge refused to give the particular instruction requested, and in his charge to the jury, after referring to a single transaction as generally insufficient to warrant a finding that there was authority to act in other later transactions, added "but sometimes the conduct, where it covers a long period of time, or a variety of transactions, will render a person liable for the acts of a person as his agent when it was not his intention to constitute the person as his agent." The substance of the charge was that, if persons were allowed to deal with an agent on his own representations that he had authority to act for his principal, and the principal recognized the dealings as valid and gave no notice of any change in the conditions, he might be bound by subsequent transactions of a similar kind, even though they were unauthorized or expressly forbidden. *Held*, that the plaintiff had no ground for exception. *Ibid*.
16. In an action for negligently causing the burning over of a woodlot of the plaintiff, where the presiding judge under R. L. c. 175, § 66, admits the declarations of a deceased employee of the defendant that he sent

other employees of the defendant to clear certain land and that in doing so they had started a fire and it had got away from them, which is competent evidence against the defendant if the declarant had authority to give the order, and, on objection of the defendant, the judge says that he admits the evidence *de bene* leaving the plaintiff to show the authority later, and afterwards the defendant does not bring the matter to the attention of the judge either by a request to strike out the evidence admitted *de bene* or by a request for a ruling that there is no evidence for the jury on the question of the authority of the declarant, the defendant can have no ground for exception to the admission of the declarations whether there was evidence of authority or not. *Putnam v. Harris*, 58.'

17. In an action on an executory contract requiring the payment of purchase money on the part of the plaintiff, if the judge in charging the jury makes use of the word "tender" in a popular sense as meaning a readiness, willingness and ability to perform providing the other party performs his part, and the plaintiff does not ask the judge to explain the sense in which the word is used, it will be assumed that the word was used and understood in such popular sense, and the plaintiff afterwards cannot complain because the use of the word in its technical sense would have been inaccurate. *Cave v. Osborne*, 482.
18. In an action against persons alleged to be carrying on business as partners for injuries caused by the negligence of a person alleged to have been in the defendants' employ, where the defendants deny the existence of the partnership, if a witness for the plaintiff testifies that the concern employing the negligent servant was a partnership consisting of the defendants whose names appeared in the firm name, and afterwards on cross-examination testifies that his knowledge on this subject is derived solely from the directory, and the presiding judge instructs the jury to disregard the evidence as mere hearsay, this is a compliance with a motion of the defendants to strike out the evidence, and is correct. *Norris v. Anthony*, 225.
19. In an action by a buyer of goods in transit, which the seller undertook to transfer by the indorsement and delivery of the bills of lading, against the seller for non-delivery of the goods, where the plaintiff contends that the defendant, either undertook to deliver the goods absolutely, or, if he merely agreed to transfer the bills of lading properly and to give the necessary orders to the carrier, he had failed to give such necessary orders, the presiding judge properly may refuse to give instructions to the jury as to the duties of a common carrier of freight in regard to delivery which, however correct they may be as abstract propositions of law, are inapplicable to the case. *Sullivan v. Fugazzi*, 518.
20. Where by an order of court an action by a buyer of goods against the seller for the non-delivery of and delay in delivering the goods is tried together with an action by the same plaintiff against the railroad company by which the goods were transported, and the seller testifies as a witness in his own behalf, after he has been cross-examined by the plaintiff, the presiding judge in his discretion, against the objection of the witness, may

Practice, Civil (*continued*).

allow the railroad company to cross-examine him in its own interest; and to such exercise of discretion no exception lies, especially where the testimony elicited is not reported and the excepting party fails to show that he has been injured by the ruling. *Sullivan v. Fugazzi*, 518.

21. In an action by a workman against his employer for personal injuries from the bursting of a cast iron header to a boiler forming part of the steam main of the defendant's power plant, the presiding judge excluded the following question addressed by the defendant to its master mechanic: "Is it customary in the well conducted concerns with which you are familiar, to adopt a hydraulic test or a hammer test on a steam line of substantially this description, after it has been installed and in operation?" The ground of the exclusion did not appear. *Held*, that, whether the question was excluded on the ground that the experience of the witness with other plants was not wide enough to make his testimony of any value or on the ground that the inquiry was immaterial or that the nature of the information sought was too remote from the issue on trial, the exclusion was within the discretion of the presiding judge. *Erickson v. American Steel & Wire Co.* 119.

22. In an action against a street railway company for personal injuries from being thrown from the seat of a wagon by a collision with a car of the defendant, where it appeared that the plaintiff was driving in a heavy covered wagon with a projecting top and sides at a slow trot on the right hand side of the defendant's track and turned diagonally across to the store of a customer on the left hand side of the street, when, just as the rear wheels cleared the track, the wagon was struck by a car of the defendant approaching from behind, the question of the plaintiff's due care was prominent throughout the trial. The defendant asked the judge to rule "that the plaintiff driving along outside the outer rail of the street railway would not be in the exercise of due care if, without taking reasonable precaution to find out whether the car was coming, he drove across the car tracks." The judge refused to give this instruction and the defendant excepted to the refusal and to a refusal to rule that the plaintiff was not entitled to recover. The bill of exceptions stated that the judge "submitted the case to the jury under instructions which were not otherwise excepted to except as above stated." *Held*, that this statement construed in the light of the request above quoted meant that full instructions were given to which no exceptions were taken; that if the request was intended to express a general proposition the judge was not called upon to follow the words used but was at liberty to instruct the jury in such language as he deemed proper, or, if the request related to a particular portion of the testimony the judge was not required to single out any particular feature of the plaintiff's conduct for the consideration of the jury as conclusive upon the question of his due care; so that in either case there was no ground for exception. *Stubbs v. Boston & Northern Street Railway*, 518.

Proper exercise of discretion by presiding judge as to examination and cross-examination of witnesses, see WITNESS, 1-3; *ante*, 20.

Question by justice presiding at hearing on probate appeal to witness as to

intent of witness which was relevant and competent held proper, see EVIDENCE, 34.

Discretion of judge presiding at trial held to have been exercised properly in exclusion of evidence because of remoteness, see EVIDENCE, 28, 29.

Judge presiding at trial held rightly to have refused request for instruction which failed to state accurately law with regard to facts in evidence, see AGENCY, 4.

It is within discretion of judge presiding at trial to exclude evidence offered by defendant to show that sidewalk with Hyatt lights alleged by plaintiff to be defective was "of the usual and ordinary construction for that kind of a walk," and exercise of his discretion will not be disturbed although in opinion of this court it might have been better to admit such evidence, see EVIDENCE, 28.

Where defendant asked judge presiding at trial to give jury certain instruction and judge said to defendant's counsel "This seems to be a question of law," to which he assented, and judge thereupon refused the request, stating to jury, without defendant's excepting, that question was one of law, if question was one of fact on which this court cannot say that judge was wrong, exception to refusal to rule as requested will not be sustained, see CARRIER, 4.

#### Costs.

23. In an action of *scire facias* against one who, having been summoned as trustee in an action begun by trustee process, has been defaulted and has been charged as trustee, the plaintiff under R. L. c. 189, § 76, can recover the costs of the action of *scire facias*, but under § 72 of the same chapter he cannot recover costs for his travel and term fees included in the judgment in the original action in which the trustee was defaulted, if in the action of *scire facias* the plaintiff has recovered enough property of the original defendant to pay such term fees and travel although not enough to pay the amount of the damages included in his judgment. *Leonard v. Weymouth*, 479.

#### Records of Court.

Record of district court imports verity, see EVIDENCE, 4; *post*, 48.

Records of district court held consistent with assumption that judge was present while debtor in poor debtor proceedings was there, and not to show that creditor was present; that creditor therefore on record did not sustain burden in action on debtor's recognizance of proving breach of bond, see POOR DEBTOR.

#### Docket Entries.

24. The docket entries in a case until extended constitute the record of the proceedings. *Shanahan v. Boston & Northern Street Railway*, 412.

#### In Trustee Process.

Right of trustee to costs as defendant in *scire facias*, see *ante*, 23.

Case reported to this court, where it appeared that ruling of trial judge that trustee under trustee process should be discharged was right but that

Practice, Civil (*continued*).

judgment should be for plaintiff against defendant, remitted to Superior Court for such judgment, see *ante*, 9.

*In Mandamus.*

Finding by single justice of this court on hearing of petition for writ of mandamus that allegations of petition were not proved will not be revised on appeal, no evidence being reported, see *post*, 28.

*Appeal.*

25. Under R. L. c. 173, § 96, an appeal from a judgment of the Superior Court raises such questions of law as are disclosed by the record. *Shanahan v. Boston & Northern Street Railway*, 412.

26. The findings of fact of a judge sitting without a jury will not be revised unless it is made to appear that they were unwarranted by the evidence. *Bailey v. Marden*, 277.

27. A defendant in a civil action in a police, district or municipal court by consenting to the entry of a default and a judgment against him is not estopped from appealing to the Superior Court under R. L. c. 173, § 97. *Warburton v. Gourse*, 203.

28. On an appeal from a final decree made by a single justice of this court dismissing a petition for a writ of mandamus, where the evidence before the justice is not reported to the full court, a finding by him that the allegations of the petition were not proved cannot be revised. *Hodgdon v. Fuller*, 331.

Appeal from Land Court, see LAND COURT.

Appeal may be taken to this court from order denying motion to recommit auditor's report because of alleged error of auditor in admission of evidence where by agreement of parties auditor's findings of fact were to be final, see *ante*, 8.

Previous to St. 1906, c. 342, § 2, and under R. L. c. 173, § 96, there was no right of appeal from judgment of Superior Court on answer in abatement although defence was one of substance relating to jurisdiction of court, see *ante*, 3.

*Exceptions.*

29. Exceptions not argued are treated as waived. *McLeod v. South Deerfield Water Supply District*, 6.

30. This court has no jurisdiction to allow an amendment to a bill of exceptions. *Squier v. Barnes*, 21.

31. If when a bill of exceptions is before this court one of the parties desires to amend it, his proper course is to ask this court to strike the case from the docket and remit it to the court in which the exceptions were allowed, to enable him to move for the allowance of the amendment there. *Ibid*.

32. The denial of a motion to take off a default is within the discretion of the presiding judge and is not the subject of exception. *Squier v. Barnes*, 21.

33. An exception to the exclusion of papers offered in evidence cannot be sustained unless the bill of exceptions shows that the papers excluded contained material evidence. *Ibid*.

34. The refusal of a judge, after the filing of a bill of exceptions and more than twenty days after the verdict, to allow the amendment of the bill by the insertion of an exception to the exclusion of certain questions put to a deponent, is no ground for exception. *Sullivan v. Crave & Martin Co.* 435.
35. The admission of evidence which in no way could have prejudiced the excepting party is no ground for exception. *Gardner v. Buller*, 96.
36. No exception lies to the exclusion of testimony which later in the trial is given by the same witness. *Wheeler v. Anglim*, 600.
37. The exclusion of a question gives no ground for exception if undisputed evidence subsequently admitted shows fully the fact which the testimony called for by the question was offered to prove. *Anteroitz v. New York, New Haven, & Hartford Railroad*, 542.
38. No exception lies to the refusal of a request for a ruling which although correct as an abstract proposition of law is immaterial and the refusal of which has not injured the excepting party. *Mills v. Smith*, 11.
39. The exclusion of an answer of a witness is no ground for exception if it does not tend to show the facts sought to be established by it, or if such facts have been admitted by the other side. *Rice v. James*, 458.
40. A party to an action of contract cannot at the argument of exceptions taken by him complain of a ruling as to what instruments constituted the contract between the parties which was made by the judge at his request. *Mills v. Smith*, 11.
41. An exception to the admission of evidence cannot be sustained on the ground that a witness or declarant stated a matter not within his personal knowledge, if the matter thus stated otherwise appears in the bill of exceptions to have been the fact, so that the admission of the evidence could have done the excepting party no harm. *Putnam v. Harris*, 58.
42. On the argument of an exception to the admission of the declarations of a deceased person under R. L. c. 175, § 66, the excepting party cannot raise the objection that the declarations stated matters not within the personal knowledge of the declarant, if the question to the witness did not call for facts beyond the knowledge of the declarant and no motion was made to strike out the answer on this ground. *Ibid.*
43. In an action for slander an exception of the defendant to a refusal of the presiding judge to rule, that if the defendant spoke certain words which the defendant has testified that he spoke instead of those alleged in the declaration the plaintiff cannot recover for the words set forth in the declaration, is disposed of by a special finding of the jury that the defendant used the language set forth in the declaration, which makes the effect of the other words immaterial. *Ward v. Merriam*, 135.
44. In an action for slander, if the defendant failed to demur to the declaration and went to trial on the issues raised by the pleadings, after a verdict for the plaintiff and at the argument of an exception to the refusal of the presiding judge to rule that the plaintiff could not recover on the declaration, the defendant cannot take advantage of the point that the declaration does not set out a cause of action by reason of its failure to state sufficient circumstances to show the sense in which the words were spoken, and the

Practice, Civil (*continued*).

only argument open to him is that upon all the evidence the words were spoken under such conditions as not to be slanderous. *Ward v. Merriam*, 135.

45. In an action purporting to be by a married woman for charging her with the crime of adultery by spoken words, whether after a verdict for the plaintiff the defendant at the argument of an exception to a refusal of the presiding judge to rule that the plaintiff could not recover can raise for the first time the question of the sufficiency of the proof as to the plaintiff being a married woman, *quære*. *Ibid*.

46. In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the defendant, if the presiding judge orders a verdict for the defendant, and the plaintiff in a bill of exceptions states evidence by which it appears that when the injuries were incurred the plaintiff was not in the exercise of due care, his exceptions to the exclusion of evidence upon the question of the defendant's negligence are immaterial and need not be considered by this court. *Stackpole v. Boston Elevated Railway*, 562.

47. If documents are admitted in evidence generally which are admissible only on one issue, and the party against whose objection and exception they have been admitted does not ask for an instruction limiting their use to the special purpose for which they were offered, he afterwards cannot complain that their use was not so limited. *Paquette v. Prudential Ins. Co.* 215.

Exception will lie to allowance of amendment adding to petition for damages separate claim barred by limitation of statute, see SUPERIOR COURT, 1-3. Rulings of trial judge in granting or refusing requests for instructions, or in charge to jury, passed upon, see *ante*, 12-22.

Where one took no exception to submission to jury of special question and apparently made no objection, he cannot object to question on argument of bill of exceptions, see *ante*, 7.

Admission at trial of evidence admissible for limited purpose only and otherwise immaterial, limitation being carefully pointed out by presiding judge, is not subject of exception, see *ante*, 12.

It is proper exercise of discretion of judge presiding at trial to which no exception lies either to submit to jury or withhold from their consideration documents admissible in evidence on particular issue but introduced generally, see *ante*, 13.

Courts take judicial notice of statutes contained in the Revised Laws, and a refusal to admit such statutes as evidence is not ground of exception, see EVIDENCE, 1.

No exception will lie to exclusion by presiding judge of evidence offered by defendant to show that sidewalk with Hyatt lights alleged by plaintiff to be defective was "of the usual and ordinary construction for that kind of a walk," although in opinion of this court discretion of judge might have been exercised better by admitting such evidence, see EVIDENCE, 28.

Exception to refusal of judge presiding at trial to allow question to expert witness that might have been based either upon qualifications of expert or remoteness of evidence cannot be sustained, see *ante*, 21.

Action of judge presiding at trial in admitting *de bene* evidence introduced by plaintiff which at time of offer is incompetent for lack of other evidence, leaving plaintiff to make it competent with other evidence later, is not open to exception by defendant although other evidence is not introduced later, if defendant does not call matter to judge's attention or move to strike out evidence, see *ante*, 16.

In action for price of goods sold and delivered where principal question is whether broker who purchased goods had authority from defendant and plaintiff makes request for instruction that authority may be proper inference from fact of previous purchases, which were made under special authority for each transaction, request, if it makes no distinction between special and general authority rightly is refused, see AGENCY, 4.

Where defendant asked judge presiding at trial to give jury certain instruction and judge said to defendant's counsel, "This seems to be a question of law," to which defendant's counsel assented, and judge refused request, stating to jury without defendant's excepting that question was one of law, if question was one of fact on which this court cannot say that judge was wrong, exception to refusal to rule as requested will not be sustained, see CARRIER, 4.

#### *Entry of Judgment.*

48. On the issue whether in a previous action for liquidated damages a judgment upon a default had been entered in the District Court of Central Berkshire on a certain day, which was the Friday following the default, it was found by the trial judge in the Superior Court, that in the district court no specific order for judgment was made on the day in question, and that there was no evidence of any standing or general order of that court that judgment should be so entered except so far as such order might be inferred from the existence of "the custom [of that court] in a civil action for liquidated damages, where the defendant is defaulted for non-entry of an appearance, for the clerk of said court to assess the damages and enter judgment on the Friday following the day of default; and that it is the rule of said court that all such actions are ripe for judgment upon default." By St. 1869, c. 416, § 5, the standing justice of that court is given "power to make all proper rules for the conduct of the business of said court," but it did not appear that he had made any rule upon the subject. The judge of the Superior Court ruled that there was no rule of the district court requiring the entry of judgment upon a default at any particular time so imperative that in the absence of any record of a judgment such a judgment could be presumed. *Held*, that the ruling was right; that, whether or not the custom shown would support an entry of judgment appearing upon the record if it was disputed as entered without authority, it was not equivalent to such a direct unvarying order as to create an implication that a record showing no such entry of judgment was wrong. *Gardner v. Butler*, 96.

Judgment cannot be entered in action against one who was adjudicated bankrupt after suit was brought if motion for continuance founded on fact of such bankruptcy is pending, irrespective of fact that defendant has been defaulted, see BANKRUPTCY, 3, 4.



**PRACTICE, CRIMINAL.**

Evidence of intent of defendant under indictment for advertising procuring of abortion obtained by police officer in disguise by lying and deceit, and evidence of admissions by conduct of defendant held admissible, see EVIDENCE, 35, 9.

**PROXIMATE CAUSE.**

Intoxicated person incapable of standing or walking may maintain action against one whose negligence is proximate cause of injuries received by plaintiff while so intoxicated, see NEGLIGENCE, 6, 59, 60.

Question of whether railroad company, which furnishes defective car to consignee as unloading place for freight whereby consignee's employee is injured, is responsible, or whether negligence of consignee who sent employee to car knowing of defective condition was proximate cause of accident, see NEGLIGENCE, 61-63.

**RAILROAD.**

*Semble*, that conductor and brakeman of railroad train are not under duty to assist intoxicated person from train but, *held*, that, if they do so, they are under duty to use due care not to leave him in perilous position, see NEGLIGENCE, 6, 59, 60.

Rights of constable as officer of watch authorized to serve criminal process entering railroad train without warrant with purpose either of examining persons abroad or of apprehending criminals, see CONSTABLE, 1-4.

Court will take judicial notice of facts that from time to time tracks and bridges of railroad must be repaired, and that it may be necessary to use crossovers from one main track to another, and that in proper operation of passenger train on railroad there may be jerks and lurches, see EVIDENCE, 2, 3.

It is duty of common carrier of passengers to select and employ sufficient number of competent servants to meet any exigency which, in exercise of the high degree of diligence and care to which carrier is held, it reasonably ought to have anticipated, see CARRIER, 2.

Duty of railroad company as common carrier of goods as to furnishing proper place for delivery, and liability when it chooses to deliver from car on tracks in freight yard and car proves defective, although it belongs to another company, see NEGLIGENCE, 61-63.

Fact that conductor punched ticket of passenger occupying unnecessarily exposed position voluntarily assumed on railroad train does not make company liable if passenger when train comes in collision with another receives injuries due in part to exposed position; nor is it material that passengers customarily occupied such position and had their tickets punched there by conductor, see NEGLIGENCE, 56; EVIDENCE, 24.

Other cases of liability of railroad company for personal injuries, see NEGLIGENCE, 55-60.

Liability of railroad company for causing death of employee, see NEGLIGENCE, 11.

## REAL ACTION.

Where case of demandant in real action depends on proving breach of condition of mortgage by failure to make payments required by its terms, burden is on plaintiff or demandant to establish that payments were not made, see EVIDENCE, 5, 7; whether production of mortgage by demandant is even *prima facie* proof of such non-payment, *quaere*, see EVIDENCE, 6.

## RELEASE.

1. In order that the release of one of several joint tortfeasors shall discharge the others the person released must be capable of being sued for the joint liability. *Pickwick v. McCauliff*, 70.
2. The principle, that the release of one of several joint tortfeasors operates as a bar to a recovery against the others, has no application where the party released is the Commonwealth which cannot be sued as a tortfeasor. *Ibid.*
3. If a civil engineer, employed by a board of commissioners to take charge of and inspect certain work in behalf of the Commonwealth, while acting in the course of his duties is injured through the negligence of the servants of a contractor who has a contract with the Commonwealth for a part of the work of which he is in charge, and signs a paper agreeing in consideration of receiving his pay while absent from duty and being indemnified for hospital expenses and doctors' bills to make no claim upon the Commonwealth for the injury, this instrument has no effect to bar an action against the contractor for his injuries. *Ibid.*

## RELIGIOUS SOCIETY.

1. If land and a building thereon have been conveyed by a deed to certain persons as trustees, to hold in trust for a religious society, the appointment of new trustees by the society, although valid, does not transfer the title to the land and building without a deed. *Lee v. Methodist Episcopal Church*, 47.
2. A conveyance of land, recited to be in consideration of one dollar and other valuable considerations paid by certain persons as trustees of an unincorporated religious society named, to such "trustees, their heirs and assigns forever," to have and to hold to the grantees, "trustees, and their heirs and assigns, to their own use and behoof forever," paid for by money raised and contributed by the members of the unincorporated religious society, creates only such a trust as results from the payment of the money, the nature of which in this case the court found it unnecessary to consider. *Ibid.*
3. For a period of about thirty-seven years the pastors of an unincorporated religious society were appointed by a certain church organized under the laws of another State. For the first twenty-four years of this period the unincorporated society was known as a "mission" and was not supplied regularly with a pastor, but during the last thirteen years of the period it was known as a "station" and a pastor was assigned to it annually by the

Religious Society (*continued*).

incorporated church. The salary of the pastor thus assigned was paid by the unincorporated society. It did not appear that the unincorporated society ever had been dedicated as a church connected with the incorporated church or that any formal union between the two organizations ever existed. In a suit in equity by persons appointed as trustees by the incorporated church, to establish control over the church building and the lot of land used by the unincorporated society, it was *held*, that the plaintiffs had failed to show any right of property, possession or control of the land and building. *Lee v. Methodist Episcopal Church*, 47.

Fund held in trust income of which is to be devoted to religious uses in connection with particular church is public charity, see CHARITY, 2, 3.

### RES INTER ALIOS.

Where, under contract for employment of agent in distant State to manage principal's real estate interests there, agent brings action for services, neither principal nor his personal representative can rely in defence upon fraud of agent in certain acts in behalf of principal toward another estate of which agent was administrator, see CONTRACT, 19.

### RES IPSA LOQUITUR.

Doctrine of *res ipsa loquitur* applies only where accident is such that there is just ground for reasonable inference that according to ordinary experience it would not have occurred without negligence of defendant, see NEGLIGENCE, 68; and, in action by woman passenger against street railway company, mere fact that plaintiff's dress caught on something as she was alighting from car and firmly held her after falling is not sufficient to warrant submission of case to jury, see NEGLIGENCE, 38.

### RES JUDICATA.

Decree of "Bill dismissed" in suit in equity by trustee of bankrupt's estate to set aside bills of sale and obtain possession of personal property of bankrupt in defendant's possession is final decree upon merits, includes and disposes of everything that was or might have been litigated in the case and is bar to action of tort against same defendant by one who during pendency of suit purchased from trustee certain property of bankrupt not included in bills of sale but included in property of bankrupt claimed in suit in equity, see EQUITY PLEADING AND PRACTICE, 7-9.

### RETAINER.

Evidence warranting inference that amounts of retainers were agreed upon between attorney and client, see ATTORNEY AT LAW.

### RULES OF COURT.

See EQUITY PLEADING AND PRACTICE, 3, 5, 10.

## SALE.

Sale of good will of manufacturer to competitor upheld as valid under circumstances and covenant not to engage in same business for certain period in designated territory enforced in equity, see CONTRACT, 7, 8.

Where goods were ordered of plaintiff on printed blank stating that sale was made on representations thereon and no others and that seller's agent had no authority to make further representations, purchaser cannot repudiate sale after delivery on ground that agent of plaintiff procured order by false representations, see CONTRACT, 9.

Transfer by dealer of whole of stock of merchandise outside his usual course of business in satisfaction of pre-existing debt is void, being within meaning of St. 1903, c. 415; but not so of such transfer of fixtures and tools, see SALES OF MERCHANDISE IN BULK, 1, 2.

Where there is oral contract for sale of goods by sample for price more than \$50, and memorandum does not state price, and goods are delivered on railroad car sent by buyer, are received and examined by buyer and are refused by him, seller is barred from recovery by statute of frauds although refusal of buyer is arbitrary and unreasonable, see FRAUDS, STATUTE OF, 3-6.

## SALES OF MERCHANDISE IN BULK.

1. A sale of fixtures and tools is not a sale of a stock of merchandise within the meaning of St. 1903, c. 415, regulating sales of merchandise in bulk. *Gallus v. Elmer*, 106.
2. A transfer by a dealer of the whole of his stock of merchandise outside his usual course of business in satisfaction of a pre-existing debt is a sale in bulk within the meaning of St. 1903, c. 415, making such a sale void as against creditors of the seller unless the requirements of that statute are complied with. *Ibid*.

## SCHOOL AND SCHOOL COMMITTEE.

1. Under R. L. c. 42, § 27, which gives to the school committee of a town "the general charge and superintendence of all the public schools," the committee in the performance of this duty act as public officers and not as the agents of the town, and a vote of a town to reopen a certain school, which would operate and is intended to operate to take pupils from schools to which they have been assigned by the school committee and transfer them to the reopened school, is not binding on the committee. *Morse v. Ashley*, 294.
2. On the trial of a petition for a writ of mandamus to compel the school committee of a town to reopen a certain school, if the respondents in their answer aver that in their judgment the interests of the pupils who formerly attended the school closed by the committee required that they should be transferred to other schools affording greater facilities for education, and that the number of pupils attending the school closed by the committee was so small as in the judgment of the committee to render its maintenance inadvisable and unnecessary, it will be assumed, in the

absence of any evidence to the contrary, that the respondents acted in good faith and that their judgment was correct. *Morse v. Ashley*, 294.

### SCIRE FACIAS.

Right of trustee, defendant in *scire facias*, to costs, see PRACTICE, CIVIL, 23.

### SEAL.

Offer under seal not contract unless accepted, see CONTRACT, 1.

### SET-OFF.

See PRACTICE, CIVIL, 4.

### SEWER.

Assessment for benefits from construction of sewer in city of Boston included in order for laying out and construction of street, see CONSTITUTIONAL LAW, 1, 2; TAX, 1.

### SLANDER.

See LIBEL AND SLANDER.

### SNOW AND ICE.

See ICE AND SNOW.

### SOUTH DEERFIELD WATER SUPPLY COMPANY.

By St. 1902, c. 486, which established the South Deerfield Water Supply District, the South Deerfield Water Supply Company was authorized to "take by purchase or otherwise and hold the waters of Roaring Brook and of any or all of its tributaries in the towns of Deerfield and Whately, except that part of said brook and tributaries which lies west of and above the main road leading from Conway village to West Whately; and the waters of any springs or other sources on the watershed of said brook, with the water rights connected therewith, except that part which lies west of and above the main road leading from Conway village to West Whately." By the same statute the company was authorized to take lands and easements in the towns of Deerfield and Whately and construct thereon the dams and other structures and lay and maintain the aqueducts necessary for providing and maintaining complete and effective water works. The watershed of Roaring Brook east of the road mentioned in the statute was largely outside of the towns of Deerfield and Whately. The company took in the manner provided by the statute all the waters of Roaring Brook and its tributaries east of the road mentioned in the statute which it was authorized to take by the statute, and afterwards refused to pay damages for the taking of waters in the town of Hatfield on the ground that it had the right to take only that part of the waters of Roaring Brook and its tributaries lying within the towns of Deerfield and Whately. *Held*, on a petition for the damages thus refused, that the company was authorized to take all the waters of Roaring Brook

and its tributaries east of the road mentioned in the statute outside the towns of Deerfield and Whately as well as within them, although the authority to take lands and easements for the construction of such dams, reservoirs and other works as might be necessary was confined to the towns of Deerfield and Whately. *McLeod v. South Deerfield Water Supply District*, 6.

### SPECIAL PRECEPT.

See ATTACHMENT.

### STATUTE.

In the construction of statutes it is a general rule that a limiting or qualifying word must be confined to the last antecedent unless the subject matter requires a different construction. *Williams v. Old Colony Street Railway*, 305.

Unconstitutionality of § 7 of St. 1897, c. 426, renders §§ 1 and 8 of same statute unconstitutional and of no effect, and therefore § 1 of St. 1899, c. 450, which was a re-enactment of § 1 of St. 1897, c. 426, first became effectual in 1899, see CONSTITUTIONAL LAW, 1, 2.

Petitioner relying on provision of statute giving damages on account of limitation of height of buildings is estopped to deny constitutionality of another provision of same statute requiring deduction for benefits from such limitation, where petitioner has no standing in court except under provision requiring such deduction and where such two provisions are not separable, see CONSTITUTIONAL LAW, 18.

Construction of St. 1893, c. 368, St. 1900, c. 439, and St. 1906, c. 238, relating to building of Acushnet River bridge between New Bedford and Fairhaven with regard to apportionment by commissioners of cost and power of commissioners thereunder, see ACUSHNET RIVER BRIDGE, 1-5.

Construction of St. 1887, c. 157, § 6, as to amount to be paid Vineyard Haven Water Company in case of taking of franchise and corporate property by town of Tisbury, see VINEYARD HAVEN WATER COMPANY.

Construction of St. 1902, c. 486, with regard to establishment of South Deerfield Water Supply District, see SOUTH DEERFIELD WATER SUPPLY COMPANY.

Construction of charters of other corporations as to corporate powers, see CORPORATION, 1; OLD COLONY STREET RAILWAY COMPANY.

Statutes cited and expounded, see page 755.

### STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

### STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

### STATUTES CITED AND EXPOUNDED.

See page 755.

## STREET RAILWAY.

1. Whether a street railway company which sees fit to use as a motive power a force so imperfectly understood as electricity might not be liable for an injury to a passenger caused by a flash from the controller of a car although the flash could not have been prevented by any means that yet have been devised or by any care that could be exercised, *quaere*. *Gilmore v. Milford & Uxbridge Street Railway*, 44.
  2. The duty of a street railway company to protect its passengers from injury does not extend to exercising on the Fourth of July a supervision of the details of the firing of cannon and other demonstrations of patriotic emotion by citizens along the line of a highway through which its cars pass, and it is not the duty of its servants when a car is about to pass a door yard where a cannon is being fired in such a demonstration to stop the car and make an investigation to determine whether the cannon is loaded and pointed properly. *Ormandroyd v. Fitchburg & Leominster Street Railway*, 130.
- Duty of street railway company as to passenger entering car in subway, see NEGLIGENCE, 28-30; CARRIER, 2.
- No duty of conductor of street car stopped for passengers to alight on street of country town to warn woman passenger about to alight that there is gutter between car and sidewalk, see NEGLIGENCE, 40.
- Duty of conductor of open electric car with regard to starting car while woman accompanied by boy two years of age is boarding it and before she has reached position of safety, see NEGLIGENCE, 25, 26.
- Power of Old Colony Street Railway Company under its charter to maintain poles and wires for transmission of electricity in streets through which it is not authorized to operate its railway, see OLD COLONY STREET RAILWAY COMPANY.
- It is duty of street railway company as common carrier of passengers to select and employ sufficient number of competent servants to meet any exigency which, in exercise of high degree of diligence and care toward passengers to which it is held, it reasonably ought to have anticipated, see CARRIER, 2; this principle applied to control of crowds in subway, see NEGLIGENCE, 28-30.
- Whether employee of street railway company, who with other employees had been transported free on company's lines for number of years but within two or three years had had pass thrown out to him annually with pay envelope, nothing being said and terms of pass stating that employee using it assumed all risk of accidents while doing so, can recover for injuries occurring through company's negligence while he was on company's car using pass and not on company's business, see CARRIER, 3, 4.
- Other cases of liability of street railway company for negligence, see NEGLIGENCE, 25-54.

## SUBWAY.

- Duty of street railway company using subway with regard to crowds and protection of passengers there, and question whether passenger entering such crowd assumes risk of injury and is in exercise of due care, see NEGLIGENCE, 28-30; CARRIER, 2.

## SUPERIOR COURT.

1. Although, where a judge of the Superior Court has authority to allow an amendment, no exception lies to the exercise of his discretion, an exception lies to the allowance of an amendment beyond the jurisdiction of the court. *Partridge v. Arlington*, 530.
2. The Superior Court has no power to allow an amendment to a petition for damages under a statute adding a separate claim which is barred by the limitation of the statute. *Ibid.*
3. The Superior Court has no power to allow an amendment to a petition under Pub. Sts. c. 52, §§ 15, 16, for damages from a change of grade in a highway, which undertakes to add as a petitioner the wife of the original petitioner, asserting a claim for damages to one of the lots of land described in the original petition belonging to the wife of the petitioner in her own right for which she failed to file a petition within one year from the completion of the work, as required by § 15, or to file within a period of five or six years any petition to the Superior Court under § 16 to have her damages ascertained by a jury. *Ibid.*

Defendant may appeal to Superior Court from judgment following default entered in police, district, or municipal court with his consent, see *PRACTICE, CIVIL*, 27.

Superior Court still has jurisdiction over suits in equity to remove cloud from title, such jurisdiction not having been transferred to Land Court, by St. 1904, c. 448, § 1, see *EQUITY JURISDICTION*, 6.

No attachment by special precept in Superior Court under R. L. c. 167, § 80, can be made by trustee process unless one of alleged trustees dwells in or has usual place of business in county where action is pending, see *ATTACHMENT*.

Appeal from judgment of Superior Court overruling plea in abatement in bastardy proceeding under R. L. c. 82, entered before St. 1902, c. 342, § 2, was in force, and based on lack of allegation in complaint in district court that defendant either resided or had usual place of business in district of that court, held not to lie under R. L. c. 173, § 96; and, if plea could be treated as motion to dismiss, motion was held rightly denied since such proceedings were initiatory only in lower court and case was really in Superior Court which had jurisdiction if either complainant or defendant resided in county or judicial district where case was heard, see *PRACTICE, CIVIL*, 1-3.

## SUPREME JUDICIAL COURT.

Supreme Judicial Court still has jurisdiction over suits in equity to remove cloud from title, such jurisdiction not having been transferred to Land Court by St. 1904, c. 448, § 1, see *EQUITY JURISDICTION*, 6.

No jurisdiction in Supreme Judicial Court to allow amendment to bill of exceptions; but party desiring amendment should ask court to strike case from docket and remit it to court in which exceptions were allowed where proper motion should be made, see *PRACTICE, CIVIL*, 30, 31.



## SURETY.

1. A surety on a bond is discharged from further liability by a substantial change in the conditions to which the bond relates made without his knowledge and consent. *Germania Ins. Co. v. Lange*, 67.
2. In an action by an insurance company against the surety on the bond of an agent of the plaintiff for a certain city given for the faithful performance of his duties, it appeared that when the bond was given the agent was employed by the plaintiff at a fixed annual salary of \$1,800, the plaintiff paying the office expenses and brokers' commissions which amounted to about \$2,100 a year, and that nearly nine years after the bond was given a new arrangement was made between the plaintiff and its agent without the knowledge of the defendant, whereby the agent instead of receiving a fixed salary was to be paid a certain commission on all business transacted by him in behalf of the plaintiff and was to pay all the expenses of the business in the city where he was agent including advertising and the salaries of sub-agents, and also became responsible to the plaintiff for all premiums due on policies written by him or his sub-agents and not returned by him to the plaintiff for cancellation. In other respects his duties were the same as when he received a fixed salary. If he did as much business under the new arrangement as under the old it would yield him a greater compensation. *Held*, that there had been a substantial change in the contract to which the bond related and that the defendant was discharged from liability for any breaches of the bond that occurred after the change was made. *Ibid*.

In action against surety on bond of agent of insurance company for faithful performance of his contract with company, where defence is variation in terms of contract of agency since bond was given without knowledge and consent of surety, and where contract between agent and company was not fully described in bond, oral evidence offered by defendant to prove exact terms of agent's contract is admissible, see EVIDENCE, 81.

Action to recover money paid by plaintiff on judgment in action against him as surety on defendant's bond given to dissolve attachment in another action can be maintained although between bringing of action on bond and recovery of judgment defendant was adjudicated bankrupt, see BANKRUPTCY, 1.

## TAX.

*Assessments for Benefits.*

1. Assessment for benefits from the construction of a sewer in the city of Boston, which was included in an order made on July 15, 1897, for the laying out and construction of a street under St. 1891, c. 323, and acts in amendment thereof, and was constructed in 1902 and 1903 under the same statute, can be made only under the provisions of St. 1902, c. 521, after the completion of the improvements of which the sewer is a part. *Tappan v. Street Commissioners*, 498.

Action of landowners against city on alleged contract to pay certain specified amounts as damages to plaintiffs for construction of street by which payments were to be postponed until betterments were assessed, brought more than six years after construction began, but before completion of work and before betterments were assessed, cannot be maintained although delay of city in work was not justifiable, see *CONTRACT*, 20.

*Street Watering.*

2. St. 1897, c. 419, now R. L. c. 26, §§ 26, 27, authorizing assessments for the watering of streets in cities, is constitutional as applied to occupied estates in the central portion of a large city. Following *Sears v. Boston*, 173 Mass. 71. *Hodgdon v. Haverhill*, 327.

Procedure by petition or bill in equity to recover assessments for street watering paid under protest, see *PLEADING, CIVIL*, 1; *EQUITY PLEADING AND PRACTICE*, 2.

*Commonwealth Flats.*

Part of Commonwealth Flats held under bond for deed from Commonwealth and used for business purposes is not taxable as leased land under St. 1904, c. 385, see *post*, 14.

Commonwealth held liable to repay tax on land to lessee of part of Commonwealth Flats for business purposes made before St. 1904, c. 385, under lease whereby lessee covenanted to pay taxes on improvements placed on land by lessee which parties agreed to consider as personal property, and where Commonwealth covenanted for lessee's quiet enjoyment, see *LANDLORD AND TENANT*, 1.

*For maintaining Militia.*

Sts. 1905, c. 465, §§ 110-123, and 1906, c. 504, § 9, providing for raising funds for maintenance of armories are constitutional, see *CONSTITUTIONAL LAW*, 19, 20.

*On Mortgaged Property.*

3. The provisions of R. L. c. 12, §§ 16, 18, in regard to separate taxation of the interests of mortgagors and mortgagees in real estate do not apply to a mortgage made by a corporation organized under the laws of another State, which includes besides real estate in this Commonwealth real estate in other States and also the machinery, equipment, patents, trademark and franchises of the corporation. *Brooks v. West Springfield*, 190.

*On Capital of Stockbroker in his Business.*

4. The provision of Pub. Sts. c. 11, § 20, cl. 1, that "All goods, wares, merchandise, and other stock in trade . . . shall be taxed in those places where the owners hire or occupy manufactories, stores, shops, or wharves," does not describe or include the capital used by a stockbroker in his business, and such capital is taxable to the stockbroker where he has his home and not where he has his office. *Prince v. Boston*, 545.

*On Shares in Corporation held by Pledgee.*

5. R. L. c. 12, § 26, providing that "personal property mortgaged or pledged shall for the purpose of taxation be deemed the property of the party in possession thereof on the first day of May," refers only to tangible property, and does not apply to a pledge of shares of stock in a corporation. *Chase v. Boston*, 522.
6. St. 1903, c. 423, § 1, relating to the transfer of shares in corporations by delivery of the certificates signed in blank, now contained in St. 1903, c. 437, § 28, does not operate to make the pledgee of such shares the absolute owner, and where certificates thus signed in blank are delivered as security under a contract of pledge the shares are taxable to the pledgor. *Ibid.*
7. Where a broker buys shares of stocks upon orders in writing from his separate customers with a specific agreement with each customer that the ownership shall be in the customer subject to a lien of the broker for any indebtedness to him, each order directing the broker to buy a certain number of shares of specified stocks for the account and risk of the purchaser, and the broker makes the purchases as directed and notifies each customer of the purchase and the price paid, and the customers make part payments to the broker, usually of about forty per cent of the price, and the certificates for the purchased shares with blank transfers signed by the former owners named therein are left with the broker as security for the balance of the price due from each customer to the broker, the broker being expressly authorized by the customer to pledge the shares for loans to himself, and the broker does this as his convenience demands, but the certificates of stock bought for and belonging to each customer are kept apart in a separate envelope, whether pledged or not, the broker holds the shares as a pledgee with the right to repledge them to others, and they are not taxable to him but are taxable to the customers who are the owners and pledgors. *Ibid.*

*On Pipes and Mains of Water Company.*

8. The pipes and mains of a water company are not machinery employed in any branch of manufactures within the meaning of the second exception of R. L. c. 12, § 23, in regard to the assessment of personal property for taxation. *Coffin v. Artesian Water Co.* 274.
9. Whether the water mains and pipes of a foreign corporation supplying water to a portion of a town, laid entirely through private land, the corporation "having a lease to maintain said pipes from the owners of the fee," can be assessed to the corporation as real estate, here was not considered, the only question raised being whether the mains and pipes were taxable as personal property. *Ibid.*
10. In an action by the collector of taxes of the town of Salisbury against a foreign corporation supplying the public at Salisbury Beach with water, to recover a tax assessed upon the defendant's water mains and pipes as personal property, on the ground that they were underground pipes laid in public streets by a corporation other than a street railway company within

the meaning of St. 1902, c. 342, § 1, the case was submitted on an agreed statement of facts without the power to draw inferences, by which it appeared that all the water mains and pipes assessed ran through private land without any question except two hundred feet which were under a way seventy-five feet wide on Salisbury Beach on land which before August, 1903, had belonged to a *quasi* corporation called the Commoners of Salisbury, and that the town in July, 1903, had given to the Commoners of Salisbury a release containing this exception: "Excepting however from this conveyance any right of the public and the marsh owners in and to the old way to the marshes as the same now exists, and is used, and in and to the way seventy-five feet wide running across said beach in continuation of the town road leading to the same, . . . and reserving to itself and its successors the right to use and to permit any person residing in said town to use for purposes of travel only . . . the way seventy-five feet wide as now laid out extending from the present highway to the sea. . . . The location of said ways may be changed from time to time as agreed in writing by the selectmen of said town and by said Commoners, their successors and assigns." *Held*, that there was no statement that the way seventy-five feet wide was a public street, and that if inferences could have been drawn it might have been inferred that it was not; so that the case was not brought within the statute and the water mains and pipes were not taxable as personal property. *Coffin v. Artesian Water Co.* 274.

#### *Abatement.*

11. Under R. L. c. 12, § 46, if a taxpayer has brought in a sworn list of assessable property in accordance with the requirements of the preceding sections of that statute and has not refused to answer on oath any necessary inquiries of the assessors as to the nature and amount of his property, the assessors must receive the list as true, and lawfully cannot refuse to abate a tax on the ground that the list should have contained property not included in it. *Chase v. Boston*, 522.
12. The list of taxable property required of taxpayers by R. L. c. 12, § 41, the filing of which within the time fixed by the notice is made by § 74 of the same chapter a prerequisite to an abatement of taxes, must be sworn to before one of the persons authorized to administer the oath by § 43 of the same chapter. *Amherst College v. Assessors of Amherst*, 168.
13. In the requirement of R. L. c. 12, § 73, that an application for the abatement of a tax shall be made within six months after the date of the tax bill, the term "tax bill" means the notice which the collector is required to send to each taxpayer of the amount of his tax; and such a notice on a postal card properly addressed stating the amount of the tax and for what, from whom and to whom it is due and where and when it is to be paid, and stamped with a post mark showing the day on which it was mailed although not otherwise dated, is a sufficient tax bill within the meaning of the statute, so that an application for an abatement of the tax filed more than six months after the date of such a notice is too late. *Ibid.*

*Exemption.*

14. St. 1904, c. 385, providing that lands of the Commonwealth in that part of Boston called South Boston known as the Commonwealth Flats "shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof," does not apply to land occupied under a bond for a deed from the Commonwealth by one who carries on business there, and such land is exempt from taxation. *Corcoran v. Boston*, 586.
15. A house assessed at \$800 and a barn assessed at \$300 standing on land assessed at \$700 and situated a short distance in the rear of the official house of a president of a college without any fence or other indication of boundary between the two properties, built for a servant of a former president who was a janitor of the college while he lived in the house, the house being let to a person not in the employ of the college at a rent of \$35 a quarter, and the barn being used by the president of the college for storage purposes, are not occupied by the college or its officers for the purposes for which the college was incorporated within the meaning of R. L. c. 12, § 5, cl. 3, and consequently are not exempt from taxation. *Amherst College v. Assessors of Amherst*, 168.
16. Under R. L. c. 12, § 5, cl. 3, parcels of real estate belonging to a college consisting of a house used as the residence of the president of the college and also for his official entertaining and for meeting members of the faculty, students and others who wish to see him on business, another house used as the residence of the professor of astronomy and also for astronomical work and to some extent for hearing classes in astronomy, a grove open to the public as a park and used as a place of recreation by such students of the college as wish to walk, stroll or saunter there, a field used for outdoor sports especially at times when a larger athletic field belonging to the college is not available, and a triangular lot given to the college to make a suitable approach to the larger athletic field, are occupied for the purposes for which the college was incorporated within the meaning of the statute, and consequently are exempt from taxation. *Ibid.*

## TISBURY.

Construction of St. 1887, c. 157, § 6, with regard to amount to be paid by town of Tisbury to Vineyard Haven Water Company upon taking franchise and corporate property of company, see VINEYARD HAVEN WATER COMPANY.

## TRUST.

*Public Charity.*

Fund held in trust income of which is to be devoted to religious uses in connection with particular church is public charity, see CHARITY, 2, 3.

*Oral concerning Land.*

Where one conveys land to another under oral agreement to reconvey which grantee refuses to perform and grantee sets up statute of frauds, R. L.

c. 147, § 1, grantor can recover value of land on ground of failure of consideration, see CONTRACT, 12.

If owner without consideration executes absolute deed of land in order that grantee may execute mortgage of it to secure money lent grantor and has deed recorded but retains possession of it, and grantee executes mortgage as requested, grantor cannot maintain bill in equity against grantee to cancel deed except as to mortgage, see DEED; EQUITY JURISDICTION, 7.

#### *Unincorporated Religious Society.*

Construction of deed of land, recited to be in consideration of one dollar and other valuable considerations paid by certain persons as trustees of unincorporated religious society, to such "trustees their heirs and assigns forever," *habendum* to grantees, "trustees and their heirs and assigns, to their own use and behoof forever," consideration having been paid by members of unincorporated society, with regard to what trust was created and rights of certain incorporated religious society claiming right to control property," see RELIGIOUS SOCIETY, 1-3.

#### TRUSTEE PROCESS.

Right of trustee in trustee process, to costs as defendant in *scire facias*, see PRACTICE, CIVIL, 23.

Case reported to this court, where action was begun by trustee process and it appeared that ruling of judge discharging trustee was right but that plaintiff should have judgment against defendant, remitted to Superior Court with directions to ascertain amount due and enter judgment accordingly, see PRACTICE, CIVIL, 9.

No attachment by special precept in Superior Court under R. L. c. 187, § 80, can be made by trustee process unless one of alleged trustees dwells or has his usual place of business in county where action is pending, see ATTACHMENT.

#### UNFAIR COMPETITION.

Opinion of justices as to constitutionality of proposed legislation restricting making of certain contracts for lease of patented machinery, see CONSTITUTIONAL LAW, 7-11.

#### USAGE.

See CUSTOM.

#### VETERAN.

1. A veteran employed by a city from a certified list under the statutes and rules relating to the civil service, if removed without a full hearing in violation of R. L. c. 19, § 23, is entitled to a writ of mandamus ordering his reinstatement, and a petition for such a writ filed a little more than two years and one month after the removal is not barred by laches as a matter of law for that reason only. *Sims v. Police Commissioner*, 547.
2. The provision of St. 1896, c. 517, § 5, now embodied in R. L. c. 19, § 23,

*Veteran (continued).*

- that no veteran holding an office or employment in the public service of a city or town shall be removed except after a full hearing, applies only to veterans who hold offices or employments under the statutes and rules relating to the civil service, and does not apply to the removal of a person employed as the janitor of a police station in Boston before such employment was included in the list of positions to be filled by certificates from the board of civil service commissioners, and where the person removed never had been registered in the office of that board as a veteran or had been certified for appointment. *Sims v. Police Commissioner*, 547.
8. A veteran employed by a city as a laborer under R. L. c. 19, §§ 23, 24, and the rules made by the civil service commissioners under the last named section, who wrongfully is discharged and refused employment by the city while there is work to be done of the kind for which he was employed and he is competent to perform it, may compel his reinstatement by a writ of mandamus addressed to the mayor of the city and the head of the department in which he was employed although he has brought an action of contract against the city, which still is pending, to recover the wages which he lost during the time that he was excluded from employment. *Ransom v. Mayor of Boston*, 537.
  4. Where a veteran, who is enrolled in the classified list of the public service and holds the office or employment of messenger in the printing department of a city, is notified in writing by the superintendent of printing that he is dismissed from the service of the city for the reason that the position filled by him no longer is necessary and should be abolished, and that he will be given a hearing at the mayor's office at a certain hour on a certain day, and the notice is received by the veteran at least seventy-two hours before the time fixed for the hearing, and he voluntarily attends and is accorded a fair hearing, he has waived the requirement of R. L. c. 19, § 23, that the notice of such a hearing shall be given by the mayor, and cannot rely on this omission to defeat the proceedings if otherwise valid. *Hill v. Mayor of Boston*, 569.
  5. Under R. L. c. 19, § 23, a veteran enrolled in the classified list of the public service and holding the office or employment of messenger in the printing department of a city is not removed lawfully, nor is his position abolished, if, after he has been heard in his own behalf before the mayor in accordance with the requirements of the statute, the mayor sends to the superintendent of printing this communication: "Your action in abolishing the position of messenger in the printing department is hereby approved," and the next day the superintendent sends to the veteran this notice: "The position of messenger which you are filling in this department has been abolished, and there will be no further need of your services," these communications not being equivalent to a written order signed by the mayor stating the cause for such abolition which is required by the statute after such a hearing. *Ibid.*
  6. On a petition for a writ of mandamus the question whether the petitioner so unreasonably has neglected to enforce his right that the court will deny him the remedy must depend upon the circumstances of each particular case. *Ibid.*

7. At the trial of a petition, by a veteran enrolled in the classified list of the public service and holding the office or employment of messenger in the printing department of a city, for a writ of mandamus commanding the mayor and the superintendent of the printing department to recognize the petitioner as the messenger of that department and to place his name on the pay roll of the city as such messenger, it appeared that immediately after the plaintiff was notified orally of the abolition of his position and his discharge from employment he retained counsel who thereafter acted for him, but that owing to poverty he could not furnish money to prosecute his case until two years after his discharge, when he brought an action of contract against the city for arrears of salary, and, this action having been terminated by the presiding judge ordering a verdict for the defendant, he thereupon brought his petition for the writ of mandamus. In that proceeding the justice who heard the case found as facts that the petitioner never abandoned his claim that he had been removed from office unlawfully, and that he was advised that his action for salary was the proper remedy to test this question. *Held*, that under the circumstances the delay of two years before bring the action of contract could not be said to be such an acquiescence by him in his dismissal as to require the court to deny him the writ of mandamus. *Hill v. Mayor of Boston*, 569.
8. On a petition by a veteran for a writ of mandamus addressed to the mayor and the superintendent of the printing department of a city, to compel the reinstatement of the petitioner as messenger of the printing department, from which two years before he had been removed unlawfully contrary to the provisions of R. L. c. 19, § 23, if the petitioner prevails and the writ is to issue, although under R. L. c. 192, § 5, the petitioner cannot recover arrears of salary or damages for his unlawful ouster, he can recover any damages which are shown to be the proximate result of the wrongful answer of the respondents, but in this case such damages would be only nominal, as upon restoration to his position as messenger the petitioner would become entitled to the accrued emoluments of the position during the entire period of his exclusion if found to have been able and willing to perform its duties. *Ibid*.

#### VINEYARD HAVEN WATER COMPANY.

St. 1887, c. 157, § 6, gave the town of Tisbury the right to take the franchise, corporate property and all the rights and privileges of the Vineyard Haven Water Company "on payment to said corporation of the total cost of its franchise, works and property of any kind held under the provisions of this act, including in such cost interest on each expenditure from its date to the date of taking, as hereinafter provided, at the rate of seven per centum per annum. If the cost of maintaining and operating the works of said corporation shall exceed, in any year, the income derived from said works by said corporation for that year, then such excess shall be added to the total cost; and if the income derived from said works by said corporation exceeds, in any year, the cost of maintaining and operating said works for that year then such excess shall be deducted from the total cost."



*Held*, that, in case of a taking by the town, the effect of this provision was to guarantee to the corporation the return of all the money invested in the enterprise with simple interest thereon at the rate of seven per cent per annum for the length of time that it remained invested. *Tisbury v. Vineyard Haven Water Co.* 196.

#### WAIVER.

Objection that bill in equity is multifarious is waived by going to hearing on merits, see *EQUITY PLEADING AND PRACTICE*, 1.

Veteran who, acting in accordance with informal notice of hearing before mayor as to abolition of his office held under civil service law and regulations and his consequent discharge, attends and is given fair hearing, waives informality of notice, see *VETERAN*, 4.

Consent by devisees under will to allowance of a second account, filed by executor three years after first account which was filed later than provisions of his probate bond permitted, is waiver by them of all previous breaches of bond in not rendering account, see *EXECUTOR AND ADMINISTRATOR*, 8.

If no demand is made by payee on maker of note within time required to charge indorser, and indorser, knowing facts which have released him from liability, but not their legal effect, writes on back of note waiver of "demand notice and protest," in absence of fraud his ignorance of the legal effect of such facts will not render waiver ineffectual; such ignorance of legal effect of circumstances is evidence of operation of mind admissible as bearing on question of fraud, see *BILLS AND NOTES*, 1, 2.

#### WATCH AND WARD.

Rights of constable as officer of watch authorized to serve criminal process entering railroad train without a warrant with purpose either of examining persons abroad or of apprehending criminals, see *CONSTABLE*, 1-4.

#### WATERCOURSE.

See *WATER RIGHTS*.

#### WATER RIGHTS.

1. A custom or usage in the use of the waters of a river by the proprietor of a mill privilege and by the proprietors of other mill privileges below him on the stream, which has existed more than twenty years but never has been adverse and has created no rights by prescription, does not affect the rights of the respective proprietors to the use of the waters as against each other. *Mason v. Whitney*, 152.
2. It is not unreasonable for the proprietor of a mill privilege upon a river, as against the proprietors of other mill privileges below him on the stream, to use the water of the stream in his legitimate business at night as well as by day so long as he leaves the natural flow of the stream unobstructed and undiminished during the ordinary working hours of the day. *Ibid*.

3. The fact that the water of a stream comes to a riparian proprietor changed as to the hours of its accumulation and discharge in a way that would be beneficial to a riparian proprietor below him on the stream does not give such lower proprietor a right to more than the natural flow of the stream, and it is not unreasonable for the upper proprietor, even if the water above him is used only in the daytime, to use a part of it in his business in the night-time, provided he leaves as much as the regular flow of the stream to pass unaffected by his use at all times during the business hours of the day. *Mason v. Whitney*, 152.
4. In determining whether the use of the waters of a stream by the proprietor of a mill privilege is reasonable as against a proprietor below him on the stream, it is proper to consider the fact that he has a large reservoir on a tributary of the stream some miles above which he maintains and uses in connection with his mill as affecting the natural flow of the stream to the proprietor below, the part of the use of the stream and reservoir which is detrimental and that part which is beneficial to the proprietor below being taken together to show how far the upper proprietor can go in his use of the water. *Ibid.*

#### WATER SUPPLY.

Construction of St. 1902, c. 486, which established South Deerfield Water Supply District, see **SOUTH DEERFIELD WATER SUPPLY COMPANY.**

#### WATERWORKS.

Whether pipes and mains of water company are taxable, see **TAX**, 8-10.

Construction of St. 1887, c. 157, § 6, with regard to taking by town of Tisbury of plant of Vineyard Haven Water Company, see **VINEYARD HAVEN WATER COMPANY.**

#### WAY.

##### *Private.*

Jurisdiction and power of court in suit in equity asking for mandatory injunction restraining permanent obstruction of right of way and for damages, where granting of injunction would be inequitable in view of offer of defendant to provide plaintiff with equally advantageous right of way and of hardship to defendant in issuing of injunction, see **EQUITY JURISDICTION**, 3, 4, 12.

Rights of owner of building having right to maintain openings into and upon adjoining passageway for light and air and to ventilate into it to enjoin operation of electric fan by defendant in such way as to send heated, impure and ill smelling air back upon plaintiff's premises, see **NUISANCE**, 1.

##### *Public.*

What is public way.

Reservation in deed of town of right of way, "to use and to permit any person residing in said town to use for purposes of travel only. . . .

Way (*continued*).

The location . . . may be changed from time to time as agreed . . . by selectmen of said town and by "grantee in deed, does not create public street, see TAX, 10.

#### Defect in highway.

1. The absence of suitable railings or barriers at the sides of a bridge over a brook, the bridge being thirty feet long and thirteen and a half feet wide between stringers eight inches high on each side and forming a part of the main highway between two towns, can be found to be a defect in the highway. *Cutting v. Shelburne*, 1.
2. The presence in a street of a town of a large number of loose stones of different sizes over which the horse of a traveller stumbles may be found to be a defect in the highway within the meaning of R. L. c. 51, § 18. *Adams v. Stoneham*, 597.
3. In an action under R. L. c. 51, § 18, against a town for personal injuries caused by an alleged defect in a highway consisting of the presence in the road of a large number of loose stones of different sizes over which the plaintiff's horse stumbled, evidence offered by the defendant, to prove that it had made an appropriation for the repair of streets in the year of the accident sufficient to provide for an expenditure of a certain sum of money per mile for all its streets, properly may be excluded as irrelevant to the question whether it had used reasonable care and diligence to keep the street where the alleged defect existed in good repair. *Ibid*.
4. If a traveller on a highway of a city in cold and stormy weather falls and is injured from slipping on a portion of the sidewalk of the highway consisting of Hyatt lights made partly of glass set in cement or concrete, the surface of which is smooth and slippery and has grown more so from being walked on after it was put in, in an action against the city under R. L. c. 51, § 18, he is entitled to go to the jury on the question whether there was a defect in the highway which might have been remedied by reasonable care and diligence on the part of the city. *Moynihan v. Holyoke*, 26.

#### Negligence in use of.

For cases involving negligence in use of highway, see NEGLIGENCE, 1, 2, 3, 41-54, 64, 65; NUISANCE, 2.

#### WILL.

It is proper for justice presiding at hearing of probate appeal where issue is whether will was procured by undue influence of son of testator to ask son "Now, in reference to the subject of influencing your father, or those things which might naturally tend to influence your father about the making of the will, did you say or do anything with a view to such influence?" see EVIDENCE, 34.

For construction of wills, see DEVISE AND LEGACY.

#### WIRES.

Power of Old Colony Street Railway Company, as successor of Brockton Street Railway Company, to maintain poles and wires for transmission of

electricity in streets through which it is not authorized to operate railway, see OLD COLONY STREET RAILWAY COMPANY.

### WITNESS.

#### *Cross-examination.*

1. It is within the discretion of a presiding judge reasonably to limit the cross-examination of a witness. *Squier v. Barnes*, 21.
  2. Where in an action of contract for compensation for professional services the defendant has cross-examined the plaintiff from about noon until four o'clock, asking many questions which were excluded, it is reasonable for the presiding judge to notify the defendant that he must close his cross-examination by half past four o'clock, there being nothing to show that there is any evidence which the defendant reasonably can expect to elicit by a further cross-examination of the witness. *Ibid.*
  3. The extent to which cross-examination upon collateral issues shall be allowed for the purpose of testing a witness's honesty, credibility or accuracy of recollection must be determined largely by the trial judge in the exercise of his discretion. *Greer v. Union Street Railway*, 246.
- Defendant in action tried together with action by same plaintiff against another defendant for liability arising from same transaction may be cross-examined by other defendant against objection of witness, see PRACTICE, CIVIL, 20.

#### *Contradiction.*

4. Previous material statements made by a witness contrary to those in his testimony are admissible for the purpose of contradicting him. *Paquette v. Prudential Ins. Co.* 215.

#### *Force of Words used by Witness.*

Expletive or declamatory words of witness used in describing accident which appear to be used in exaggerated or distorted sense will be given little if any weight, see EVIDENCE, 19.

#### *Witness Insane since Former Trial.*

*Semble*, that stenographic report of testimony of witness at former trial of same case who since that trial has become insane is admissible in evidence if material to issue, see EVIDENCE, 16.

### WORDS.

- "Abroad." See *Creeden v. Boston & Maine Railroad*, 280, 283.
- "Application." See *Paquette v. Prudential Ins. Co.* 215, 221.
- "Consideration." See *Bogigian v. Booklovers Library*, 444, 446.
- "Criminals." See *Creeden v. Boston & Maine Railroad*, 280, 282.
- "Dwelling-house." See *Bowditch v. Norwich Union Ins. Co.* 565, 568.
- "Glue." See *Brown v. Clothey*, 271, 272.
- "Goods, wares, merchandise and other stock in trade." See *Prince v. Boston*, 545, 546.

Words (*continued*).

- "Improvements." See *Peters v. Stone*, 179, 185.
- "Leased." See *Corcoran v. Boston*, 586, 588.
- "Merchandise." See *Prince v. Boston*, 545, 546.
- "On hand." See *Brown v. Clothey*, 271, 273.
- "Ripe for judgment." See *American Wood Working Machinery Co. v. Furbush*, 455, 457.
- "Sale." See *Gallus v. Elmer*, 106, 109.
- "Stock in trade." See *Prince v. Boston*, 545, 546.
- "Tax bill." See *Amherst College v. Assessors of Amherst*, 168, 177.
- "Tender." See *Cave v. Osborne*, 482, 485.
- "To share equally." See *Allen v. Boardman*, 284, 286, 287.
- "Wares." See *Prince v. Boston*, 545, 546.
- "Wherein." See *Williams v. Old Colony Street Railway*, 395, 397.

# STATUTES.

## STATUTES CITED AND EXPOUNDED.

### ENGLISH STATUTES.

30 & 31 Vict. c. 131, § 25.	Companies Act	144
-----------------------------	---------------	-----

### STATUTES OF THE UNITED STATES.

1893, c. 541.	Bankruptcy	290
— — — § 11.	"	457
— — — § 17.	"	43

### PROVINCIAL STATUTES.

1699-1700, c. 10.	Watch and Ward	283
1712-13, c. 4.	" "	283
1753-54, c. 10, § 3.	Tax	546

### STATUTES OF RHODE ISLAND.

Pub. Laws (1880) c. 802.	Liability of Incorporated Hospital	150
--------------------------	------------------------------------	-----

### STATUTES OF THE COMMONWEALTH.

1794, c. 65, § 3.	Trustee Process	481
1796, c. 82.	Watch and Ward	283
1821, c. 107.	Tax Act	546
1830, c. 83, § 4.	Trinity Church	553
1839, c. 139.	Tax Act	516
1851, c. 233, § 50.	Special Writ	575
1852, c. 812, § 38.	Maudamus	575
1856, c. 18.	Insolvency	581
1869, c. 416, § 5.	District Court of Central Berkshire	97
1874, c. 293, § 1.	First District Court of Bristol	206
1877, c. 98, §§ 1, 3, 4.	Onset Bay Grove Association	210
— c. 234.	Way	28
— — — § 2.	"	598
1878, c. 244, § 3.	Boston Board of Police	549
1882, c. 175, § 1.	Tax	192
1884, c. 320.	Civil Service	550

1885, c. 266, § 5.	Boston	549
— c. 323.	Boston Board of Police	549
1886, c. 140.	Street Railway	453
1887, c. 157, § 6.	Vineyard Haven Water Company	197, 198
— c. 383.	Equity Pleading and Practice	329, n.
1889, c. 334, § 1.	Tax	177
1890, c. 428, § 6.	Grade Crossing	262, n.
1891, c. 323.	Boston, Highways in	499, 500
1892, c. 419.	Boston Building Laws	377
1893, c. 308.	Acushnet River Bridge	261
— — — § 6.	“ “ “	258, 262, n.
— c. 396, § 59.	District and Police Courts	99, n.
— c. 402.	Way	499
1894, c. 239.	Acushnet River Bridge	258
— c. 439.	Boston, Highways in	499
— c. 443.	Boston Building Laws	377
— c. 530.	Acushnet River Bridge	258
— c. 548, §§ 23 <i>et seq.</i>	Boston Transit Commission	349
1896, c. 496.	Days of Grace	592
— c. 517, §§ 1-4, 6.	Veteran	550
— — — § 5.	“	549, 550
1897, c. 200.	Acushnet River Bridge	258
— c. 419.	Street Watering	328
— c. 426, §§ 1, 7, 8.	Boston Sewerage	499
— c. 500, §§ 5, 12.	Boston Elevated Railway	349
1898, c. 387.	Acushnet River Bridge	258
— c. 533, § 63.	Negotiable Instrument	111
— c. 562, § 14.	Court of Land Registration	487
1899, c. 131, § 2.	“ “ “	487
— c. 450.	Boston Sewerage	500
— — — § 1.	“ “	499
— c. 460.	Acushnet River Bridge	258
— — — § 6.	“ “ “	259, 260
1900, c. 439.	“ “ “	259
— — — § 6.	“ “ “	258, 261
— — — § 7.	“ “ “	262, 263, n.
— — — § 10.	“ “ “	263, n.
— c. 478.	Boston, Highways in	500
— — — § 4.	“ “	499
1901, c. 214.	Brockton Street Railway	309
— — — § 3.	“ “ “	307
— e. 280.	Lynn and Boston Railroad	308
— c. 305.	Citizens' Electric Street Railway	308
— c. 316.	Haverhill and Amesbury Street Railway	308
— c. 317.	Lawrence and Methuen Street Railway	308

1901, c. 318.	Haverhill and Southern New Hampshire Street Railway	308
— c. 347.	Haverhill and Andover Street Railway	309
— c. 348.	Lawrence and Reading Street Railway	308
— c. 350.	Georgetown, Rowley and Ipswich Street Railway	309
— c. 434.	Old Colony Street Railway	307
— c. 525.	State House Grounds	475
— — § 3.	Buildings near State House	477
1902, c. 118.	Tax	388
— c. 342.	"	278
— — § 1.	"	274
— c. 458, § 1.	Appeal	487
— c. 486, §§ 2, 3.	South Deerfield Water Supply District	9
— c. 521.	Boston, Highways in	500
— c. 543.	Buildings near State House	477
— — §§ 1, 2.	" " "	475, 479
1903, c. 284.	Conway Electric Street Railway	309
— c. 415.	Sales of Merchandise in Bulk	108
— c. 423.	Corporation	527
— — § 1.	"	525
— c. 437, § 28.	"	528
— — §§ 34, 95, 96.	"	140, n.
— — § 71.	"	195
1904, c. 239.	First Baptist Society in Brookfield	187
— c. 333.	Height of Buildings in Boston	372, 476
— — § 2.	" " "	365
— c. 371.	Armory	408, 409, 412
— c. 385.	Tax	388, 390, 587, 588
— c. 448, § 1.	Land Court	288
— — §§ 8, 10.	" "	487
1905, c. 288.	Appeal	487
— c. 316.	Abortion	468
— c. 383.	Height of Buildings in Boston	372, 375, 376, 476
— c. 391.	Armory	408
— c. 465, §§ 110-123.	"	406
— — §§ 111-115.	"	408
— — §§ 112, 116.	"	410
1906, c. 238.	Acushnet River Bridge	260
— — § 2.	" " "	261
— c. 342, § 2.	Appeal	529
— c. 403.	Arrest without a Warrant	282
— c. 463, Part II. § 41.	Railroad	526
— — — — III. § 1.	Street Railway	308



1906, c. 463, Part III. § 22	Street Railway	526
— c. 504, § 9.	Armory	408, 410

## REVISED STATUTES.

c. 17, § 4.	Watch and Ward	288
c. 109, § 54.	Trustee Process	482

## GENERAL STATUTES.

c. 145, § 13.	Mandamus	575
---------------	----------	-----

## PUBLIC STATUTES.

c. 11, § 14-16.	Tax	192
— § 20, cl. 1.	"	545, 546
— § 38.	"	176
c. 49, § 34.	Way	533
c. 52, § 15.	"	532, 533
— § 16.	"	532
c. 106.	Corporation	837
c. 186, § 14.	Mandamus	575

## REVISED LAWS.

c. 11, § 223.	Elections	282
c. 12, § 2.	Tax	195
— § 4, cl. 2.	"	193, 526
— § 5, cl. 3.	"	168
— § 15.	"	388
— § 16.	"	192, 193, 194
— §§ 17, 18, 48.	"	192
— § 20.	"	391
— § 23.	"	276
— § 26.	"	195, 527
— § 41.	"	176, 192
— §§ 42 <i>et seq.</i>	"	527
— §§ 48, 74.	"	176
— § 45.	"	192, 194
— § 51.	"	193
— § 73.	"	177
— §§ 77, 78.	"	328
c. 13, § 3.	"	177
c. 16, §§ 106-112.	Armory	408
— § 107.	"	409, 410
— §§ 108-119.	"	409
c. 19, § 23.	Veteran	538, 549, 573
— § 24.	"	538
c. 25, § 100.	Abuse of Corporate Powers	408
c. 26, §§ 26, 27.	Street Watering	328
c. 31, § 2.	Watch and Ward	282

c. 42, § 27.
c. 46, §§ 7, 13.
c. 48.
— § 18.
c. 51, § 18.
c. 52, § 8.
c. 57, § 93.
c. 66, § 5.
c. 73, § 80.
— § 103.
c. 74, § 1, cl. 4.
— § 2.
— § 3.
— § 5.
c. 75, §§ 16, 18.
— § 128.
c. 82, §§ 2, 3.
— § 9.
c. 91, §§ 4, 123, 134.
c. 100, § 86.
c. 106, § 62.
— § 71, cl. 1.
— § 73.
— § 75.
c. 108, §§ 10, 17, 23.
c. 110, § 43.
— § 44.
— § 58, cl. 5.
c. 111, § 1.
— § 260.
— § 267.
c. 118, § 73.
c. 127, § 5.
c. 128, § 13.
c. 139, § 8.
c. 141, § 22.
c. 147, § 1.
c. 149, § 1, cl. 3.
— § 23.
c. 150, § 6.
c. 159, § 3, cl. 4.
— — — cl. 6.
— — — cl. 7.
— § 23.
c. 160, § 39.
— § 45.
c. 166, § 2.
c. 167, § 1.

School Committee	296
Truants and Truant Schools	282
Way	330
“	493
“	28, 598
“	282
Seizure of Illegal Measures	282
Penalty	282
Negotiable Instrument	111
“ “	592
Statute of Frauds	445, 446, 447
“ “	446
“ “	581
“ “	505
Adulterated Drugs and Food	487
Pollution of Water Supply	282
Bastard	529
“	528
Fisheries	282
Intoxicating Liquors	282
Employers' Liability Act	540
“ “ “	89
“ “ “	76
“ “ “	416
Police Officers	282
Corporation	142
“	144, 145
“	140
Statute	308
Railroad	282
“	53
Insurance	221
Delivery of Deed	405
Appeal	487
Executor and Administrator	40
Payment of Legacy	42
Creation of Trust	293 n.
Executor's Bond	42
“ “	43
Executor and Administrator	41
Joint Owners	268
Account	256
Creditors' Bills	78, 80
Report of Facts	201
Police, District and Municipal Courts	206
“ “ “ “	99, n.
Courts	282
Venue of Actions	529

c. 167, § 15.	Special Writ	329, n.
—— § 80.	Attachment	84
c. 168, § 80.	Poor Debtor	205
—— § 42.	“ “	207
c. 173, § 96.	Appeal	413, 529
—— § 97.	“	208
—— § 106.	Exceptions	24, 436
—— § 110.	“	24
—— § 112.	New Trial	414
c. 175, § 66.	Declarations of Deceased Persons	62
—— § 77.	Proof of Foreign Law	592
c. 177, § 8.	Interest on Judgment	262
c. 179.	Writ of Entry	288
c. 182, §§ 1-15.	Settlement of Title to Land	289
c. 189, § 2.	Trustee Process	85
—— § 48.	“ “	481
—— § 72.	“ “	481, 482, n.
—— § 76.	“ “	481
c. 192, § 4.	Certiorari	328
—— § 5.	Mandamus	575
c. 201.	Claim against Commonwealth	387
c. 202, § 2.	Limitation of Action	493
c. 204, § 20.	Drunkenness	282
c. 208, §§ 109, 121.	Trespass	282
c. 212, § 16.	Abortion	468
—— § 36.	Drunkenness	282
—— § 46.	Rogues and Vagabonds	282
—— § 47.	Disorderly Person	282
—— § 53.	Violation of Ordinance	282
—— § 58.	Tramp	282
—— § 60.	Vagrant	282
—— § 62.	Vagabond	282
—— § 74.	Cruelty to Animals	282
—— § 80.	Entry without a Warrant	282
c. 214, §§ 2, 6.	Gaming	282
—— § 5.	“	383
c. 218, §§ 17, 29.	Indictment	468
—— § 39.	Bill of Particulars	468
c. 227.	Repeal of Statute	329, n.













